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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

DENNIS GROHS,

Petitioner,

vs.

GOLD BOND BUILDING PRODUCTS, a division of NATIONAL GYPSUM COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Supreme Court U.S.

QUESTIONS PRESENTED

1. In this age discrimination case did the court of appeals err in its presumption that a person in the proteced age bracket would not discriminate against someone only six years older because of age?

2. Did the court of appeals err by making inferences, presumptions and findings of fact that can only be made by the trial court?

3. Did the trial court find direct evidence of discrimination and was that finding clearly erroneous?

4. Did the court of appeals exceed its authority under Rule 52, Fed. R. Civ. P.?

5. Did the court of appeals err in requiring Petioner as part of his ADEA prima facie case to prove that he was "qualified" for the position?

6. Did the court of appeals err in its conclusion that the findings of fact of the trial court were inconsistent and therefore clearly erroneous?

7. Did the court of appeals err in making a "finding" that the man who discharged Plaintiff genuinely believed that the reasons for discharge are true?

8. Did the court of appeals decide the factual questions de novo and reverse the district court because they would have decided the case differently?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 27, amended September 29, and further amended November 2, 1988.

OPINIONS BELOW

The opinion of the court of appeals, 859 F. 2d 1283, is set out at pp. 13-19 of the Petition Appendix. The unreported order denying a rehearing, but amending the opinion is set out at pp. 25-26 of the Petition Appendix. The first order of the court of appeals amending its opinion is set out at p. 24 of the Petition Appendix. The district court's unreported decision of February 20, 1987, is set out at pp. 1-12 of the Petition Appendix.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1988, and amended on September 29, 1988. A timely petition for rehearing was filed and denied, as amended, on November 2, 1988. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULE INVOLVED

Section 4 (a) (1) of the Age Discrimination Act of 1967, 81 Stat. 603, 29 U.S.C. Section 623 (a) (1), makes it unlawful for an employer

> "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age ...."

Rule 52 (a) of the Federal Rules of Civil Procedure provides in pertinent part:

> ". . . Findings of fact, whether based on oral or documentary evidence,

> shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

STATEMENT OF THE CASE

This court has frequently emphasized to appellate courts that they are not to decide factual questions de novo, reversing any findings they would have made differently. Maine v. Taylor, 477 U.S. 131, 145 (1986); Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). In the instant case, the Seventh Circuit has defied the mandate of this court and completely retried this case on paper, making findings which are completely contrary to those made by the trial court and giving no deference to the trial court by literally ignoring the language of the district court's opinion. The

Seventh Circuit also adopted both the facts and argument of Respondent for its opinion.

On September 18, 1984, petitioner commenced this action in the United States District Court for the Northern District of Illinois. His complaint alleged that on April 29, 1983, he was discharged by his employer of 22 years because of his age.

The case was heard at a bench trial from February 17 - 20, 1987. The trial court, in an oral opinion rendered from the bench, on February 20, 1987, found that petitioner had been discharged because of his age. The district court further found this to be a non-willful violation of the Age Discrimination in Employment Act. The court's findings were made pursuant to Rule 52, Fed. R. Civ. P.

I. The trial court found that a determining factor in the discharge of Petitioner was his superior's belief that Petitioner was "old and fat." This finding was based upon witness testimony, which the trial court found credible. The Seventh Circuit discredited that finding. Instead of pointing to record evidence that would support a "definite and firm conviction that the District Court's findings are mistaken" Burger King v. Rudzewicz, 471 U.S. 462 (1985) the Seventh Circuit simply stated "This contention . . . has absolutely no support in the record." [Pet. App. 17] The Seventh Circuit ignored substantial record evidence indicating that Petitioner was discharged based upon the belief that he was old and fat.

II. The Respondent articulated, mainly through hearsay, numerous reasons for Petitioner's discharge. The trial court

found all reasons proffered by Respondent, except the new change in management style, to be pretextual. The trial court discredited the testimony of Respondent's witnesses. However, the Seventh Circuit credited all of that testimony in its opinion. The trial court's judgment as to damages was entered on March 19, 1987. The damages awarded are undisputed.

III. The Seventh Circuit (1) reweighed the evidence, (2) adopted Respondent's facts and argument as its opinion, [1] and (3) reversed the trial court's findings as clearly erroneous on on the grounds that they were inconsistent. The appellate court found that Petitioner was no longer qualified for his position as Board Plant Superintendent because of his "deficient"

1/ The Seventh Circuit's Opinion bears a striking resemblance to the main brief submitted by Respondent. [Pet. App. 20 - 23]

labor relations skills. [Pet. App. 17] This contradicts the trial court's finding that Petitioner was not given a chance to adapt to Respondent's new management style because, as the trial court found, the Petitioner was too old and expendable. The Seventh Circuit's holding that Petitioner had not proved a prima facie case because he was no longer "qualified" for his position is in direct conflict with the holding of the 5th Circuit in Bienkowski v. American Airlines, 851 F. 2d 1503 (5th Cir. 1988).

IV. The court of appeals found that it was unlikely that the man who discharged Petitioner would have thought him to be too old because Petitioner was only six years his senior. [Pet. App. 18] The presumption that a person would not discriminate against another person in the same protected group is in direct conflict with the Court's decision in

Castaneda v. Partida, 430 U.S. 482 (1977). This erroneous presumption will have an adverse effect upon future age discrimination cases in the Seventh Circuit and elsewhere.

V. The appellate court concluded that age discrimination was unlikely because one of the new supervisors was only five years younger than Petitioner [an erroneous statement] and another "new" supervisor [also an erroneous statement] was two years older than Petitioner. [Pet. App. 18] This Court, in Anderson v. Bessemer City, supra held that a determination such as this is to be made by the the trial court and not the court of appeals.

VI. The appellate court concluded that the trial court's findings of fact were inconsistent and were therefore clearly erroneous. The findings of the trial court were consistent.

VII. The appellate court concluded that the trial court erroneously found pretext based upon events which were remote in time. The appellate court ignored the trial court's determination not to credit the testimony.

The court of appeals substituted its own judgment as to what the outcome of this case should have been and reversed the trial court. In doing so, it misapplied and misapprehended the "clearly erroneous" standard set forth by this Court in Rule 52. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. Anderson, supra, at 574.

A timely petition for rehearing and suggestion for rehearing en banc was denied on November 2, 1988.

STATEMENT OF THE FACTS

Petitioner, Dennis Grohs ["Grohs"], was employed by Respondent, Gold Bond Building Products ["Gold Bond"] for more than 22 years in its Waukegan, Illinois, plant. On April 29, 1983, Grohs was abruptly discharged by Mike Ward ["Ward"] for "not not getting along with his peers." [Pet. App. 108-109] 2/ Grohs filed a charge of age discrimination with the EEOC and in 1983, Gold Bond informed the EEOC that Grohs had been discharged for various inflammatory reasons, including sexual harassment and fondling his genitals. [Pet. App. pp. 27 & 37] 3/ During the 3 1/2 day trial Gold Bond produced additional reasons for discharging

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2/ When he was discharged nothing was said to Grohs about problems getting along with his employees. [Pet. App. 109-109]

3/ The trial court found that Respondent had "dredged" up these accusations to come up with a list for the EEOC. [Pet. App. 8]

Grohs, including accusations that he had referred to black employees as "boys" and "niggers;" he had not properly maintained certain equipment; and that he was the cause of sabotage in the plant. [Pet. App. 88-89]

Grohs denied the allegations against him. He contended that Gold Bond had directed him to be a strict supervisor. Grohs testified that when Byron Bowers, the Plant Manager, promoted him to Board Plant Superintendent in 1979, he told him to "knock some heads together" because the employees were lax. 4/ [Pet. App.105-106] Grohs was strict with his employees, but that was what management expected of him at the time. Gold Bond's policy was

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4/ There were drug problems, attendance problems, safety problems, morale problems, and unskilled employees who did not care about their work in the Board Plant. [Pet. App. 90, 91, 105, 106]

strict supervision of its employees. [Pet. App. 102-105] Better employer-employee relations did not become a company policy until late March, 1983. [Pet. App. 43]

In February, 1982, Gold Bond shut down its Waukegan plant temporarily and laid off or transferred all its employees, with the exception of Grohs and three other supervisors, who remained as custodians of the plant. [Pet. App. 30] In April, 1983, Gold Bond reopened the plant with the intention of starting it up again for a 90 day trial period and attempting to decertify the union. To aid in its decertifications efforts, Gold Bond decided to make a change in its management style and to adopt a "caring and sharing" attitude toward the new employees [Pet. App. 58 - 59] The trial court found that this meant that management would stroke the workforce a little more than in the past. [Pet. App. p. 3] Only 1 out of 71 union

members was recalled. This was a new policy to to be followed by all supervisors at the start up of the Waukegan plant. [Pet. App. 63]

Grohs had always strictly adhered to company policy in the past. 5/ Thomas Lynch, attorney for Gold Bond who approved of and participated in Grohs' discharge, testified that management at Gold Bond presumed that Grohs would have attempted to comply with the new policy, but that he would not have been successful. [Pet. App. 63] Thus, he was discharged. The remaining supervisors, ages 31, 33, 41, and 43 were also expected to adopt this new management policy.

The trial court found that Robert Sarvis, Ward's direct supervisor, had

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5/ Grohs always gave his 100% cooperation to management. He was loyal and a team player. Grohs strictly followed Gold Bond's policies. [Pet. App. 92, 102 & 105]

leaned on Ward to discharge Grohs after observing Grohs at the Waukegan plant because Sarvis thought that Grohs was not "salvagable." [Pet. App. pp. 54 & 40] Sarvis felt that Grohs' colleague, Murray Qualls, age 41, was "salvagable," but not at the Waukegan plant. Sarvis leaned on Ward to discharge [not transfer] Grohs. [Pet. App. 83]

REASONS FOR GRANTING THE WRIT

I

A. THE TRIAL COURT'S FINDING THAT SARVIS WANTED GROHS DISCHARGED BECAUSE HE WAS OLD AND FAT IS NOT CLEARLY ERRONEOUS

In his oral opinion, District Court Judge James Moran, made the following factual finding of discriminatory intent:

> "Sarvis testified that Spitz referred to Plaintiff as "old and fat." I don't find Sarvis a particularly credible witness. I must say that when he said that, I thought to

> myself: I think Mr. Sarvis is verbalizing something that he thought back at the time all this happened in 1983. Certainly, on the basis of Mr. Ward's testimony -- and in that sense, I believe that -- that Sarvis leaned on him a little bit to get rid of Grohs." [Pet. App. 6]

The trial court found that Robert Sarvis, Ward's direct superior, leaned on Ward to discharge Grohs because Sarvis thought Grohs was old and fat. Ward did discharge Grohs shortly afterward. The Seventh Circuit disagreed that this was a "finding" that age was a factor in Grohs' discharge:

> "The district judge opined that 'Sarvis leaned on [Ward] a little bit to get rid of Grohs." Plaintiff improperly characterizes this as a finding by the district court that Sarvis himself was the discriminator. This contention, however, has absolutely no support in the record." [Pet. App. 17]

Grohs may prove age discrimination by persuading the court that a discriminatory reason more likely motivated the employer. Texas Department of Community

Affairs v. Burdine, 450 U.S. 248, 256 (1981). Employment discrimination cases in particular often involve sensitive and difficult issues of fact. U.S. Postal Service v. Aikens, 460 U.S. 711, 716 (1983) The trial court made its finding based upon witness testimony and inferences from other facts. The appellate court rejected that finding and inexplicably concluded that there was no support in the record. "Findings as to the design, motive, and intent with which men act [are] peculiarly factual issues for the trier of fact and therefore subject to review under Rule 52." Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982). The record evidence is as follows:

Robert Sarvis was employed by Gold Bond as Managing Director. On March 28, 1983, Sarvis took over additional responsiblity for the Waukegan plant, and seven other plants. [Pet. App. 43, 110, 111]

During discovery Sarvis was named by Gold Bond as a person with substantial knowledge of the relevant facts. [Pet. App. 64,64a] Ward described the start-up of any Gold Bond plant as "lean and mean." [Pet. App. 80 - 81] Ward testified that he was told by Sarvis that the start up of the Waukegan plant would be challenging and a very lean type of approach. [Pet. App. 81] The start up of the Waukegan plant was "lean and mean" because the plant was to be minimally staffed. [Pet. App. p. 55] This meant that the supervisors were required to work long hours during the start up. [Pet. App. 120]

Sarvis testified that "We were looking for supervisors who had on line experience, who knew how to operate the facility. We were looking for, I would say, "young" supervisors who could grow with the operation if we were able to put it on line and keep it operational." [emphasis added.] [Pet. App. 46]

Sarvis testified that his supervisor, Bob Spitz, told him that he wanted to "get rid of" Grohs because he was "too old and too fat for the job" and he "wanted him terminated." [Pet. App. 49] Sarvis testified to a conference call between himself, Jim Bavis, Vice President of Human Resources, Ward and Spitz wherein Spitz told Ward to discharge Grohs. [Pet. App. 50] The trial court did not find Sarvis to be a "particularly credible witness." [emphasis added] 6 / The trial court, however, credited Sarvis' motives if not his words. 7 / "The law often obliges finders of fact to inquire

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6 / Sarvis had been discharged by Spitz and criminally charged with receipt of stolen property and theft. Spitz testified against him at the trial. Sarvis was acquitted. Grohs obtained Sarvis' last known address from Gold Bond by filing a motion to compel.

7 / The trial court did credit Sarvis' testimony concerning the start up. [Pet. App. 50, 51, 53, 44, 45, 46, 47]

into a person's state of mind." U.S. Postal Service Bd. of Govs. v. Aikens, supra, at 716. A man's state of mind at a particular time is as much of a fact as anything else. Id. at 716-717.

Sarvis testified that after he and Spitz had made a tour of the Waukegan plant "Spitz" wanted Grohs terminated, as well as another supervisor, Murray Qualls [age 41]. [Pet. App. 48] Gold Bond impeached Sarvis' testimony by presenting Spitz who denied visiting the Waukegan plant with Sarvis. [Pet. App. 112-113] Bold Bond also presented Jim Bavis, attorney and former Vice President of Human Relations for Gold Bond. Bavis testified that Sarvis phoned him on April 14, 1983, just after he had visited the Waukegan plant, and expressed concerns about Grohs. [Pet. App. p. 65-66] Bavis took notes while he spoke to Sarvis. Those notes, which were admitted into evidence, indicate:

> "Look especially at Dennis Grohs - concerns re his people abilities. Give Bob [Spitz] my opinion. The other two look pretty good. [Referring to Dave Burks, age 33, and Jerry Orrick, age 31.] Murray may be salvagable, but not at Waukegan. Discuss this with Mike [Ward] so he will understand." [Pet App. 40]]

Bavis' notes demonstrated that Sarvis, not Spitz, wanted Grohs and Murray Qualls out. [The trial court found that Spitz who was Vice President of Manufacturing, was too high up to be concerned with the discharge of Grohs.] [Pet. App. 5] Bavis' notes also corroborate the fact that Sarvis, not Spitz, thought Grohs was old. The notes can be read to infer the fact that Sarvis felt that Grohs was not "salvagable." Sarvis made this determination solely upon the way that Grohs appeared when he visited the Waukegan plant once. Upon cross examination by Gold Bond's attorney, Sarvis denied involvement in Grohs discharge, but he defined

"involvement" as "making an evaluation of the individual, looking at his record." Sarvis knew nothing about Grohs except the way he appeared - old and fat. Upon cross examination Sarvis testified that at the time of Grohs' discharge he was not familiar with the operations there because he had recently assumed responsibility for the Waukegan plant. [Pet. App. 53] Ward, age 48, was chosen to head the start up of the Waukegan plant by Spitz - not by Sarvis. [Pet. App. 50] Ward testified that before he discharged Grohs: "He [Sarvis] cautioned me about the "old" type of people that had been in the plant." [emphasis added] [Pet. App. 82] "He [Sarvis] cautioned me about Dennis Grohs, a supervisor in the plant." [Pet. App. 83] Sarvis cautioned Ward shortly after Ward arrived at the Waukegan plant on April 13th. Grohs was discharged on April 29th.

Ward testified that "[H]e [Sarvis] agreed with my decision wholeheartedly." [Pet. App. 89]

At the trial Sarvis testified that he was 42, thus he was 38 years old at the time of Grohs discharge. [Pet. App. 41] Sarvis was not a long time employee of Gold Bond, as the other witnesses were. He had been employed for 4 1/2 years when Grohs was discharged. [Pet. App. 42] Unlike the other production supervisors, he was well educated and articulate. The trial judge witnessed his demeanor, which included his physical appearance. "The credibility of witnesses is often crucial." Christie v. Foremost Insurance Company, 785 F. 2d 584, 586 (7th Cir. 1986). "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in

what is said. Anderson at 564 U.S. at 575. In Anderson this Court acknowledged the important and sensitive role of the trial court:

> "Even the trial judge, who has heard the witnesses directly and who is more closely in touch than the appeals court with the milieu out of which the controversly before him arises, cannot always be confident that he "knows" what happened. Often, he can only determine whether the plaintiff has succeeded in presenting an account of facts that is more likely to be true than not. Our task - and the task of the appellate tribunals generally - is more limited still: we must determine whether the trial judge's conclusions are clearly erroneous."

There was sufficient evidence for the trial court to conclude that Sarvis was the discriminator. Sarvis had only been in charge of the Waukegan plant for 30 days when Grohs was discharged. Sarvis took one look at Grohs, did not review his record, or make any evaluation of him except that he was "old and fat" and not "salvagable." The word salvagable

connotes age discrimination. When Sarvis testified that "Spitz" wanted Grohs and Murray Qualls discharged - Grohs because he was "too old and too fat for the job," the trial court credited this belief to Sarvis. The evidence presented - that it was in fact Sarvis who wanted Grohs fired and Qualls transferred - coupled with Sarvis' use of the word "salvagable" - could be interpreted by the trial court to mean that that Sarvis thought Grohs was old and fat.

The start up of the Waukegan plant was to be a challenge for the supervisors who would be required to work long hours. Sarvis believed that Grohs was too old for the job. Sarvis cautioned Ward about the "old" people at the plant, but he only cautioned him about Grohs.

Based upon the above evidence, the trial court found it more likely than not that Sarvis leaned on Ward to discharge

Grohs because Sarvis thought Grohs was old and fat, thus his age was a determining factor in Grohs' discharge. This finding is supported by the evidence. Even if the record provides only thin support for the trial court's finding, it should be upheld. Hagge v. Bauer, 827 F. 2d 101, 108 (7th Cir. 1987).

It cannot be said that the interpretation from the above facts that Grohs was discharged because he was old and fat is illogical or implausible. Therefore, it is not clearly erroneous, Anderson, at 577, and the opinion of the Seventh Circuit should be reversed..

B. THE SEVENTH CIRCUIT ERRED IN ITS PRESUMPTION THAT A MAN WOULD NOT THINK THAT SOMEONE SIX YEARS HIS SENIOR WAS TOO OLD

In its opinion the Seventh Circuit stated that Ward thought Grohs was 54 and not 51 at the time he was terminated

" . . . it thus seems unlikely that Ward thought someone even six years his senior was too old." [Pet. App. p. 18] This presumption of lack of discriminatory intent is at odds with this Court's holding in Castaneda v. Partida, 430 U.S. 482 (1977). In Castaneda the district court held that a prima facie case of discrimination against Hispanics in the selection of grand juries could be rebutted by evidence that a majority of the jury commissioners were Mexican-Americans. This Court reversed, holding that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." 430 U.S. at 499.

In his concurring opinion Justice Marshall stated: "Social scientists agree

that members of minority groups frequently respond to discrimination and prejudice by attempting to dissasociate themselves from the group, even to the point of adopting the majority's negative attitudes toward the minority." 430 U.S. at 503.

The Seventh Circuit did not listen to or observe Mike Ward. Instead, it made a legal presumption that a member of the protected age bracket is unlikely to discriminate against another member of that age bracket who is close in age. This erroneous presumption will have a devastating impact upon age discrimination cases, which are very difficult to prove. If this presumption is allowed to stand, age discrimination cases will be doomed to fail in the Seventh Circuit, and possibly in other circuits.

C. THE FACTS FOUND BY THE TRIAL COURT ARE NEITHER INTERNALLY INCONSISTENT NOR CLEARLY ERRONEOUS

The Seventh Circuit reversed the decision of the trial court as clearly erroneous on the grounds that the district judge:

(a) found that Gold Bond's stated reasons to justify Grohs' discharge were a "laundry list" or a "pretext list"; [Pet. App. 15]

(b) erroneously based its pretext finding on events which were remote in time to the discharge by failing to take into account that this information was the most recent concerning Grohs' supervisory performance which was available; [Pet. App. 17]

(c) found Grohs to be a "head knocker," deficient in labor relations skills and that his personality did not fit in with the "new" image of the company; [Pet. App. 16]

(d) found that Gold Bond had adopted new "softer supervision" policies to which Grohs did not conform; [Pet. App. 19] and

(d) found that his lack of supervisory abilities was a factor in his dismissal. [Pet. App. 18]

Based on the above, the Seventh Circuit reversed on the ground that the court's findings were internally inconsistent. The court of appeals held that the trial court's finding that Grohs' supervisory style was that of a head knocker and the finding that Grohs did not conform to Gold Bond's new softer supervision polcies did not fit with his finding of pretext. [Pet. App. 19] The court of appeals thus held that Grohs was not qualified to continue his employment as a supervisor and lack of qualification was not a pretext for firing him because of his age. [Pet. App. 18-19]. This is not what the trial court found.

The trial court's findings are as follows:

(a) that traditionally Gold Bond educated its managers, and they were direct, strict, and somewhat rough around the edges. Grohs fit into that mold. [Pet. App. p. 4]

(b) that Grohs was a strong, able, experienced, supervisor, who was strict,

not terribly flexible, a tough boss and a head knocker at times. But that was the role his employer wanted him to play - until the plant reopened. [Pet. App. p. 5]

(c) that at the start up of the plant management wanted supervisors who would not unduly upset the work-force. [Pet. App. p. 6]

(d) Grohs was the type of supervisor that Gold Bond had raised him to be. However, that type of super-visor - a head knocker - did not fit in with the new management style. [Pet. App. p. 6]

(e) that despite the fact that Grohs was a strong performer, with over 20 years with the company, Gold Bond felt that he was expendable. [Pet. App. pp. 6, 7]

(f) that if Grohs was younger, Gold Bond would have sought to teach him new tricks to the limited extent they were necessary, or, to transfer him. [Pet. App. p. 7]

(g) The court rejected as pretext the numerous reasons proffered by Gold Bond to show that Grohs' labor relations were a "disaster." [Pet. App. p. 7-11]

(h) In describing Gold Bond's proffered reasons as a "pretext list" the trial court found them to be not only remote in time, but the Court also questioned if each event had occurred. [Pet. App. pp. 7-11] The trial court did not find the proffered reasons to be true, as

the Seventh Circuit contends.

(i) The court found that during the shutdown Grohs was sent elsewhere by Gold Bond to train people. [Pet. App. p. 5] The most recent information concerning Grohs was after and not before the shutdown of the plant, as stated by the Seventh Circuit.

After reweighing the evidence, the Seventh Circuit found that "Grohs' personality did not fit in with the 'new' image or strategy of the 'new' company" [Pet. App. 16]; that the "company had implemented new supervisory standards requiring 'skill' in labor relations" [Pet. App. p. 17]; that Grohs had "deficient labor relations skills" [Pet. App. 17]; that Grohs' "lack of supervisory abilities was a factor in his dismissal" [Pet. App. 18]; and that "Gold Bond could find that he was no longer qualified and discharge him." [Pet. App. 7] The court of appeals held that Gold Bond's belief that Grohs was no longer qualified

to be a supervisor, if genuinely held, "cannot be a pretext for firing Grohs on account of his age." [Pet. App. p. 18]

The trial court did not find Grohs to be lacking skill in labor relations. The court found that managers of Gold Bond were direct, strict, somewhat rough around the edges, without particularly sophisticated educational backgrounds and Grohs fit into that mold. [Pet. App. p. 4] This finding was based upon observation of and testimony from Grohs, and four other supervisors, Robert Coventry, Murray Qualls, Robert Spitz and Mike Ward. These men had all worked their way up to management positions after spending many years working for Gold Bond.

The trial court found that the company had evaluated Grohs to be a strong, able, experienced board plant superintendent; quite clearly strict, not terribly flex-

ible, and, when he thought it necessary, a head knocker at times, and a tough boss. [Pet. App. 4]

Grohs testified that prior to the shutdown when he was Board Plant Superintendent, Gold Bond's policies in dealing with its employees were very strict and Grohs strictly followed company policy. [Pet. App. 103, 105] Jon Roth, the former union president testified that the union, during contract negotions in 1981, complained about the strict company policies and wanted them changed. Gold Bond's response was that they would remain. [Pet. App. 117, 118, 119]

As Mill Superintendent, Grohs evaluation in August, 1979, indicates that he was "very professional in his approach to personnel. No grievances in 1978, [none in] 1979. Very strong in this area." [Pet. App. 33] In November of 1979, Plant Manager Byron Bowers promoted Grohs

from Mill Superintendent, where his labor relations were very good, to Board Plant Superintendent. Grohs was instructed to knock some heads together.

> Q. At the time that Byron Bowers appointed you, did you have a conversation with him?
>
> A. Yes, I did.
>
> Q. Where did it take place?
>
> A. In his office.
>
> Q. What did he say?
>
> A. He said that we needed a little discipline in the board plant. He said we needed to start knocking some heads together is what he said. [Pet. App. pp. 105-106]

Grohs' direct supervisor prior to the shutdown, Robert Coventry, testified that Grohs was "extremely loyal" and "a good company man." [Pet. App. 92] He was "a strong supervisor, good leadership." [Pt. App. 93] In Grohs' 1981, peformance appraisal Coventry wrote: "Needs to establish uniform departmental procedures

and labor relations actions." [Pet. App. 38] He explained that Grohs, as well as every supervisor in the plant, was inconsistent in his labor relations approaches. [Pet. App. 100] Coventry described Grohs' labor relations as follows:

> ". . . He was a little rough at people. He had short shrift for a man he felt was not doing his job, not interested in his job. He would speak brusquely, give them a little attention. But a man who needed help and was a good employee, I felt he was almost paternalistic." [Pet. App. p. 93]

Q. Did Dennis have people problems?

A. I don't think so. Problem people. [Pet. App. p. 94]

Q. How did Dennis do with respect to labor relations when he was the mill superintendent?

A. His relations were excellent. It's a small department, I believe 10 men a slow moving department where there was time for him to get around and talk to his men. He knew them all and had lots of opportunity to guide them and train. I think he did an excellent job.

Q. What is the difference between the board plant then?

A. Board plant is 39 or 40 people with three foremen, a high-speed operation

with instant variations requiring good reaction.

Q. Mr. Coventry, could you tell me, when Dennis worked under you, where did labor relations fall in his list of priorities?

A. As far as management by objectives, the objective sheet that we prepared, it was not in the leading areas of responsibility. It was an area of responsibility, but it took a back seat to the management objective which we listed each year. [Pet. App. 95, 96]

Coventry testified that Grohs' labor relations responsibilities were to develop a uniform system of discipline among the employees because the collective bargaining agreement did not provide for one. [Pet. App. 93, 94]

Q. Now, you said you were working him on this system of discipline. How was he doing?

A. He was trying to do a good job. He had three foremen, and he, in turn, had to pass this onto them as well as curing a few of his own natural inclinations or experiences in a natural way of performing. He was making progress, doing fine. I was satisfied with what he was doing. [Pet. App. 94-95]

Coventry testified that Grohs had improved the morale of the employees in the board plant. [Pet. App. 98-99]

Based upon the above, the trial court found that Grohs'supervisory style was the role that his employer wanted him to play until the plant reopened. [Pet. App. 5]

In 1980 Grohs was evaluated by Plant Manager, Byron Bowers, as "Competent, but very close to outstanding." [Pet. App. 36] Bowers indicated "Dennis has worked very hard to improve board plant performance. He is weak in labor relations but is working to improve this area." [Pet. App. 36] Grohs testified that Bowers told him that he was very pleased with his efforts in the board plant and he wanted to give him an outstanding rating, but for certain reasons he could not. Bowers told Grohs that he had to put down a weakness because he had given him a competent

rating, so he wrote down labor relations. [Pet. App. 106a & 106b] Bowers gave Grohs a good raise in 1980.

In August, 1981, Grohs was evaluated by Plant Manager, Tom Brooks as "Strong Competent." Brooks stated "Has done a very good job of manufacturing a quality product." Brooks further stated that Grohs had "improved in labor relations, but still needs a little finesse." [emphasis added] [Pet. App. 38] Brooks told Grohs that he was very happy with the job Grohs had done and he gave him a good raise. [Pet. App. 106c] Robert Coventry, Grohs supervisor, testified that Brooks did not feel that Grohs had problems in labor relations. [Pet. App. 97a]

A short time after his 1981, evaluation, Grohs survived two layoffs and was one of four supervisors retained at the Waukegan plant when it shut down in February, 1982. Brooks chose to retain

Grohs based upon his peformance evaluations and his versatility. [Pet. App. 62]

Bob Coventry testified that Tom Brooks, was well pleased with Grohs up to the time the plant was shut down:

> Q. Did Mr. Brooks ever complain to you about Dennis's relationships with the hourly employees?
>
> A. No. I feel Mr. Brooks was satisfied with Dennis's performance and the way he approached it.
>
> Q. Did he ever complain about Dennis's relationship with the supervisory employees to you?
>
> A. No, I can't remember anytime.
>
> Q. When you left Waukegan, did Tom Brooks make any negative remarks about Dennis to you?
>
> A. He did not, no. At that time when I left, I believe fully that Tom was satisfied with Dennis's work.

Even Mike Ward, who discharged Grohs, admitted that on paper it appeared that Grohs had done a good job as Board Plant Superintendent. [Pet. App. p. 78]

On his last day at the plant Tom Brooks told Grohs that he would arrange to have him take a Human Relations Course. 8/ Brooks also gave Grohs a very good raise. [Pet. App. 123]

The Waukegan plant shut down in February, 1982. Ward was aware that during the shut down Grohs was sent to Medicine Lodge, Kansas, to train new employees for that start up of the plant. Medicine Lodge was one of the biggest of all Gold Bond's plants. [Pet. App. 56] Waukegan was the smallest start up. [Pet. App. 56] Murray Qualls, Grohs' supervisor during the shut down of the Waukegan plant, testified that management

---

8/ In mid-1981, Grohs had taken a Techiques in Hiring seminar in Madison, Wisconsin, with two other supervisors from the Waukegan plant. [Pet. App. 123] Brooks did not arrange the course for Grohs.

at Medicine Lodge was very pleased with Grohs. [Pet App. 101] Grohs trained and supervised employees at Medicine Lodge. [Pet App. 107] Grohs even relieved the Board Plant Foreman and Board Plant Superintendent when they took their vacations. [Pet. App. 107] Grohs' help was repeatedly requested by management at Medicine Lodge. [Pet. App. 107a] The start up of the Waukegan plant would have required the supervision and training of new employees, exactly as Grohs had done at Medicine Lodge, except that the the supervision would be a little softer at the Waukegan plant to achieve decertification of the union.

The trial court did not find that labor relations "skill" was required under the new management style. Rather, the court stated that "management would stroke

the new work force a little more than had previously been the practice" [Pet. App. 6] and the company wanted "supervisors who would not upset the hourly employees unduly." [Pet. App. 6] This finding was supported by the evidence. Mike Ward was given a 90 day trial period to resurrect the Waukegan plant. His mission was to keep the union out during those 90 days. [Pet. App. 69] He wanted his supervisors to be "tuned in" to labor relations. [Pet. App. 70] One of his primary objectives was to foster good labor relations among the employees. [Pet. App. 71]

Contrary to the Seventh Circuit's holding [Pet. App. 18] the trial court did not find that "lack" of supervisory "abilities" was a factor in Grohs discharge. The trial court found that Grohs had a strong record [Pet. App. 6]

and that he was the kind of supervisor Gold Bond had raised him to be. [Pet. App. 6]

The issue here is not one of "qualification" for the job, but that of a change in policy. When Gold Bond decided to start up the Waukegan plant it determined that its "labor relations policies" were responsible for the deterioration of the plant. [Pet. App. 28] The issue is whether the remaining supervisors at the Waukegan plant, Jerry Orrick, age 31, Dave Burks, age 33, Murray Qualls, age 41, and Jon Roth, age 43, were given the chance to adapt to the new policy of softer supervision. Orrick, Burks and Qualls were among the supervisors prior to the shutdown who were inconsistent in their labor relations. [Pet. App. 100] Yet, Grohs, age 51, was discharged.

The court found that Gold Bond did not want to take a chance with Grohs; he has been set in his ways too long [ways taught him over 22 years by Gold Bond]; he is too old and he is expendable. [Pet. App. 11] Coventry testified that Grohs was a good company man, who cooperated 100% with management. [Pet. App. p. 92] Thomas Lynch, who approved of Grohs' discharge, testified that Grohs' loyalty was never questioned by Gold Bond. [Pet. App. 57, 58]

Jim Bavis, Gold Bond's Vice President of Labor Relations, talked to all of the supervisors at the Waukegan plant, including Grohs, about the new plan and the need for more understanding between supervisors and the employees. [Pet. App. 63] Lynch testified that Grohs, being a company man, would have attempted

to go along with the company's program, but he did not think Grohs would have been successful. [Pet. App. p. 63]

Ward confirmed this:

Q. Now on the day that you fired Dennis, you didn't even consider letting him stay on as a security guard, did you?

A. No.

Q. You just wanted him out?

A. That's correct.

Q. You didn't put him on probation?

A. No.

Q. You didn't transfer him to another facility?

A. No.

Q. You didn't give him a chance?

A. I discharged him.
[Pet. App. p. 77]

With respect to transferring Grohs, Lynch acknowledged that the termination of a long-term employee is an important matter. [Pet. App. 124] Bavis testified that managment considered hiring Jon Roth

[age 43] in a plant other than Waukegan because his "human relations skills are less than polished." Roth was retained in Waukegan. [Pet. App. 125] Bavis' notes indicate that Sarvis wanted to transfer Murray Qualls [age 41] from Waukegan. [Pet. App. 40] Qualls was also retained. Grohs, age 51, was neither transferred, nor retained.

The trial court found that Gold Bond did not seek to teach an old dog new tricks to the limited extent that they were necessary. [Pet. App. p. 7] For the past 22 years Grohs had strictly followed company policies and had become a head knocker. When those policies changed, Gold Bond did not believe that Grohs could adapt to those new policies because he was too set in his ways. This supports a finding of age discrimination.

D. THE HOLDING OF THE SEVENTH CIRCUIT THAT PETITIONER HAD NOT PROVED A PRIMA FACIE CASE BECAUSE HE WAS NOT QUALIFIED FOR HIS JOB IS ERRONEOUS

In McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973) this Court first set out a method of proving discrimination where there was no direct evidence of discrimination. McDonnell-Douglas was never intended to be rigid, mechanized or ritualistic. Rather, it is merely a sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical issue of discrimination. U.S. Postal Service v. Aikens, supra. McDonnell-Douglas was a hiring case. Unlike hiring cases, in which the issue is whether the plaintiff was qualified for the job, the issue in discharge cases is whether the person in the protected age category was

performing his job at a level that met the employer's legitimate expectations. This modification of the McDonnell-Douglas formula was first set out in Loeb v. Texetron, Inc., 600 F. 2d 1003, 1014 (1st Cir. 1979).

The Seventh Circuit has held that in order to establish a prima facie case an ADEA plaintiff must show:

(1) that he belongs to the protected class;

(2) that his job performance was sufficient to meet his employer's legitimate expectations;

(3) that he was discharged in spite of his performance; and

(4) that the employer sought a replacement for him.

Dale v. Chicago Tribune Co., 797 F. 2d 458 (7th Cir. 1986); Mathews v. Allis-Chalmers, 769 F. 2d 1215, 1217 (7th Cir. 1985); LaMontagne v. American

Convenience Products, Inc., 750 F. 2d 1405, 1409 (7th Cir. 1984). The Seventh Circuit did not apply this formula, but the formula for a hiring case - that Grohs must demonstrate that he was qualified for the job - in the instant case.

The formula utilized in the Fifth Circuit also requires an ADEA plaintiff to prove that he was qualified for the job. However, in Bienkowski v. American Airlines Inc., 851 F. 2d 1503 (5th Cir. 1988) the court held that for purposes of the prima facie in order to show he was qualified the plaintiff must show that he continued to possess the necessary qualifications at the time of the adverse action. The court defined this to mean that the plaintiff had not suffered any physical disability or loss of a necessary professional license or some other

occurrence that rendered him unfit for the position for which he had been hired. 851 F. 2d at 1506.

Citing Halsell v. Kiberly-Clark Corp., 683 F. 2d 285, 291 (8th Cir. 1982) the Fifth Circuit cited the intent of this Court in establishing a formula to draw an inference of discrimination which the Seventh Circuit seems to have forgotten:

> "The concept of "the prima facie case" outlined in McDonnell Douglas means only that the Plaintiff has produced enough evidence to shift the burden of production to the defendant." [851 F. 2d at 1505 n. 1]

The Seventh Circuit in the instant case has imposed an onerous burden on the ADEA plaintiff in proving a prima facie case. This was not the intention of this Court in creating the prima facie case. If the opinion of the Seventh Circuit is allowed to stand, defense attorneys in this circuit will

be successful in dismissing ADEA cases on motions for summary judgment. As the Fifth Circuit states, "the lines of battle should be drawn over the employer's articulated reason for its action and whether that reason is a pretext for age discrimination." [851 F. 2d at 1506] This rationale is consistent with the intent of this Court.

E. THE SEVENTH CIRCUIT, IN ITS FINDING OF LACK OF DISPARATE TREATMENT, ERRED AND SUBSTITUTED ITS JUDGMENT FOR THE TRIAL COURT

The Seventh Circuit's opinion states:

> "There is insufficient proof of disparate treatment, especially in light of the fact that Ward is only three years younger than Grohs, one of the new supervisors is merely five years younger, one is fifteen years younger, and the other is actually two years older. 4"

Footnote 4 states:

> "At the time he terminated Grohs, Michael Ward was 48 years old, three years younger than Dennis Grohs. The three men who were hired as new supervisors after Grohs' dismissal were aged 36, 43, and 53."
> [Pet. App. 16]

The Seventh Circuit misapprehends and misapplies the concept of disparate treatment. In this case, as stated above, the disparate treatment is the change of policy and the refusal of Gold Bond to take a chance with Grohs, age 51, because he is too set in his ways. Gold Bond did take a chance with its younger supervisors employed at the time of Grohs' discharge: Jerry Orrick, age 31, Dave Burks, age 33, Murray Qualls, age 41, and Jon Roth, age 43. [Pet. App. 61] Each of these men was required to adapt to the new company policy. Grohs, who had strictly followed company policy in the past, was discharged.

Herman Fraley, age 34 [not 36 as stated by the Seventh Circuit], was promoted to Board Plant Superintendent and transferred to the Waukegan plant on September 1, 1983 - three months after Grohs was discharged. [Pet. App. 31-32]

The last "new" supervisor, Junior Henkle, was not so new. He was transferred into the Waukegan plant one year after Grohs was discharged and after the employees had voted to decertify the union and softer supervision was no longer needed. Junior Henkle was brought into the Waukegan plant in March, 1984, because its operation was a disaster due to inexperience of the supervisory staff. Junior was brought in because of his "years of experience." [Pet. App. 79, 80, 81] What relevance, if any, the transfer of Junior Henkle has in dispelling an inference of discrimination on the basis of age is a matter to be weighed in its consideration of bias by the trial court rather than the the appellate court. Anderson v. Bessemer City, 470 U.S. at 580 n.4

F. THE TRIAL COURT WAS CORRECT IN HOLDING THAT GOLD BOND'S PROFFERED REASONS ARE A PRETEXT FOR DISCRIMINATION

The Seventh Circuit erred in the following holding:

> "The district court characterized Gold Bond's reasons for discharging Grohs as a "laundry list" and a "pretext list." It appears to have done so in part because all of the instances of Grohs' behavior of which the company received complaints occurred two and three years before Grohs' employment was terminated. . . The most recent information regarding Grohs' supervisory performance that was available was information dating back to 1980 and 1981." [Pet. App. 17]

This is not so. Mike Ward was fully aware of the fact that during the shutdown Grohs both trained and supervised new employees at the start up of Medicine Lodge, one of Gold Bond's biggest plants, just like he would have done at the start up of the Waukegan plant. Grohs did such a good job that he was asked to return several times. See Pages 40-41, above.

Also, the trial court did not "find" that the laundry list of reasons for discharging Grohs had, in fact, occurred.

Gold Bond's proffered reasons for Grohs discharge were the following:

(1) Grohs fondled his genitals in a lewd and public manner in front of female employees prior to the shutdown. [Pet. App. 31]

This accusation was denied at the trial by Grohs, Robert Coventry, Murray Qualls, and Darlene Ramig, a female employed prior to the shutdown. Tom Brooks, who allegedly told this to Ward, did not testify although he was employed by Gold Bond. The trial court questioned if this ever happened.

(2) Grohs circulated personal rumors prior to the shutdown. [Pet. App. 31]

Grohs, Robert Coventry, and Murray Qualls all denied this accusation. Tom Brooks, who did not testify, allegedly told this to Ward. The trial court questioned if this ever happened.

(3) The employees sabotaged the equipment prior to the shutdown to get back at Grohs. [Pet. App. 85]

Robert Coventry testified about the only two instances of sabotage on the part of the employees. He had investigated the sabotage and found that Grohs had nothing to do with either instance. His testimony impeached that of Jon Roth, the former union President. The trial court believed Coventry.

(4) Grohs had called black employees "nigger" and "boy." [Pet. App. 88]

Grohs testified that he called all of the hourly employees in the board plant "boy" and when it was brought to his attention he stopped. He denied ever referring to a worker as a "nigger." The trial court believed Grohs. The court also found that no grievances were filed by Roth, despite the fact that he grievances on 50% of the complaints made to him.

(5) Grohs was hated by the hourly employees. [Pet. App. 88]

The court found that because Grohs

was expected to be a "head knocker" by Gold Bond, it was not surprising that the employees did not like him.

(6) Grohs had grabbed Becky Parkman's crotch at a supervisor's dinner. [Pet. App. 84]

This accusation was denied by Grohs, as well as Robert Coventry and Murray Qualls who were both at the dinner that night. Tom Brooks, who allegedly told Ward about this, did not testify at the trial, nor did Becky Parkman. The court questioned if it had happened.

(7) At the same supervisor's dinner in June, 1981, Grohs told Darlene Ramig, a payroll secretary, that he would help her get promoted if she would go to a motel with him. [Pet. App. 31]

Grohs admitted to having a conversation with Ms. Ramig about promotion, but denied asking her to go to a motel with him. Robert Coventry testified that he investigated this allegation for Tom Brooks and reported to Brooks that it was not true. Two months after the supervisor's

dinner, Brooks gave Grohs an evaluation rating him as "strong competent" and commenting that his labor relations had "improved." Brooks, who allegedly told Ward that it was true, did not testify at the trial. Ramig did not remember this incident at all when she was questioned by the undersigned about it in the summer of 1984, just prior to the filing of this lawsuit. The trial court did not believe that Grohs propositioned Ramig.

(8) During the shutdown, the equipment was not properly maintained by Grohs. [Pet. App. 85]

The court believed Murray Qualls testimony that he was responsible for the maintenance of the equipment during the shutdown and that the equipment had been properly maintained.

(9) Grohs spoke of Becky Parkman and Donna Bittner as lesbians at a restaurant prior to the shutdown. [Pet. App. 86]

Grohs denied this and Darlene Ramig, who was present that evening confirmed his testimony. The court did not believe it happened.

(10) Roth told Ward that Grohs was the root cause of most labor management problems at the plant and the union had repeatedly complained to management about Grohs' actions. [Pet. App. 74-75]

Roth testified that the union complaints were that Grohs was following company policy. The union complaint was against the policy and not the individual. Both Lynch and Brooks backed up Grohs and said the policy would not be changed. [Pet. App. 116-117] The trial court found that if the employees did not like Grohs, it was because he was doing what the company expected of him.

(11) Ward claimed that Donna Bittner told him prior to the shutdown, when she was a quality technician, she had tagged wallboard to be held because it was inferior. Grohs had removed tags from the wallboard and directed it to be shipped. [Pet. App. p. 72,73]

Murray Qualls, Donna Bittners' supervisor, testified that it was Grohs' job to inspect the inferior wallboard and pass judgment on whether it could be sold. Qualls testified that he and Bob Coventry sent out wallboard which had been held by Bittner. Ward knew that this was an accepted practice and Donna Bittner did not testify, despite the fact that she was presently employed by Gold Bond in the Chicago area at the time of the trial. The trial court found this to be another irrelevancy.

(12) Roth accused Grohs, when he was Board Plant Superintendent, of ignoring a call of an employee's wife who had been in an accident. [Pet. App. p. 114-115]

The trial court believed Grohs' explanation and found this to be meaningless.

G. THE DISTRICT COURT DID NOT FIND THAT WARD'S BELIEF WAS GENUINELY HELD

During the trial Grohs proved that each reason proferred by Gold Bond for his discharge was not true. Grohs demontrated a continual change of story from Ward telling him that he was fired for not getting along with his peers, to the inflammatory accusations made to the EEOC, and finally the last claims made during the trial. Grohs impeached each of Gold Bond's witnesses and its documentary evidence. The trial court questioned if the events had occurred and found them to be a pretext list. Common sense dictates that if Grohs was guilty of all that was said about him, he would not have received good evaluations in 1979, 1980, and 1981. He would not have been kept after two layoffs. He would not have been sent to train new employees at the start up of Medicine Lodge.

The Seventh Circuit rendered the findings of the trial court meaningless with its holding that "Even if the allegations about Grohs were true, Ward genuinely believed that they were." [at 1289] The trial court made no finding that Ward's belief was genuine and it was not the Seventh Circuit's role to do so.

The burden of the defendant has been succinctly stated by this Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which holds that defendant "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." at 254. Burdine further held that "[T]he defendant's explanation of its legitimate reasons must be clear and reasonably specific . . . Thus, the defendant normallly will attempt to prove the

factual basis for its explanation." at 258. During the trial Mike Ward, who discharged Grohs, testified that all of the adverse information pertaining to Grohs stemming from prior to the shutdown of the Waukegan plant came from Thomas Brooks, the Plant Manager at the time. As Ward testified to each incident about Grohs, he claimed that the information had come from Thomas Brooks. In fact, during his testimony Ward mentioned the name of Tom Brooks 53 times.

On the date of the trial Thomas Brooks was still employed by Gold Bond as Manager of its Phoenix, Arizona plant. [Pet. App. p. 76] Thomas Brooks could have corroborated Ward's testimony, but he did not testify, nor was his absence explained. Brooks' name did not appear on Gold Bond's witness list, nor was an affidavit signed by Brooks submitted in support of Gold Bond's motion for summary

judgment.

At the trial Gold Bond flew in Helen O'Dea, a custodian of records from North Carolina. [Pet. App. p. 122] Gold Bond also flew in Jim Bavis, a former employee, who testified that he had been first contacted by Gold Bond on the afternoon of the day before he testified. [Pet. App. p. 67-68] Gold Bond spent effort and money to fly in these secondary witnesses, but not the most important witness, Thomas Brooks. Gold Bond had access to and control over Brooks, since he was a currently employed high-level supervisor. This Court established long ago the "missing witness rule" which holds that if a party had a witness whose testimony is important, but chooses not to call him, then an inference arises that his testimony, if produced, would be unfavorable. Graves v. United States, 150 U.S. 118, 121 (1893). This is

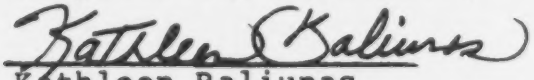
especially true in an employer-employee relationship. Chicago Col. of Ost. Med. v. Fuller, 719 F. 2d 1335 (1983).

At the trial Grohs impeached Gold Bond's witnesses. That fact and the lack of testimony from Brooks, the most important witness for Gold Bond, makes it clear that Ward's stated belief about Grohs was not genuinely held.

CONCLUSION

For the above reasons, the judgment and opinion of the Seventh Circuit should be reversed with instructions to affirm the findings of the trial court.

Respectfully submitted,



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No.

Supreme Court, U.S.
FILED
JAN 31 1989
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CLERK

IN THE

Supreme Court of the United States

October Term, 1988

DENNIS GROHS,

Petitioner,

vs.

GOLD BOND BUILDING PRODUCTS, a division of NATIONAL GYPSUM COMPANY,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

DENNIS GROHS,	)
Plaintiff,	) No. 84 C 7999
vs.	) Chgo., Ill.
GOLD BOND BUILDING	) 2:00 p.m.
PRODUCTS, a Div. of	) Feb.20, 1987
NATIONAL GYPSUM CO.	)
Defendant	)

EXCERPTS OF PROCEEDINGS BEFORE THE

HONORABLE JAMES B. MORAN

APPEARANCES:

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District Courts Oral Opinion

THE COURT: Well, people, I'm prepared to rule. I do conclude that defendant has been guilty of a nonwillful violaton of the act. I get there somewhat differently from where either side is coming from. What came through loud and clear in the evidence is we're not talking about a white-collar kind of business, or a sedentary business, or a high-tech business. Manufacturing wallboard is hard, rough work in a primary industrial process.

In 1981, construction was slow. Waukegan couldn't produce volume, because of the market conditions, which was close enough to capacity to keep costs below the anticipated price.

There were also plant problems, an aggressive union, a partial loss of control of personnel because of drugs, resentments, a lot of entry-level workers. The decision was made to close it down.

District Courts Oral Opinion

When it was reopened or when the start-up started, certainly, it was done through a conscious mangement decision that they would give it a try, talking in terms of 90 days, and see if it could be reopened under conditions conducive to long-term profitability. As far as the company was concerned, that meant no union. So I think one thing that came through, without question, was that on the start-up, that decertification was a key element of corporate strategy.

How to go about that? One was to co-op the union leadership. John Roth had been the union president for 20 years. He was the spokesman for the employees. If he became a supervisor for the company, he would no longer be the president of the union, and the company would also have his leadership skills enlisted on behalf of Gold Bond.

Another was -- and, I must say, I found this one very curious because people were practically sitting up here and testifying to some fairly massive unfair labor practices -- another was a decision to basically say no on re-hires to former employees because of their adherence to the union.

Indeed, the termination of the plaintiff and the agreement with the union, through Mr. Roth, not to insist on re-hires of union people occur, I think, the same day. It was either the same day or a day

apart; I'm not quite sure.

A third aspect of that stradegy was that management would stroke the new work force a little more than had previously been the practice, although given the kind of industrial setting that we had, as I said, we are not talking about faculty committees and the secretary pool at a law firm. It is rough, though work.

Well, how did the plaintiff fit in? He had been with the company for over 20 years. He had come up through the ranks. One thing that was quite clear from who testified and what they testified about is that Gold Bond did enlist its management

personnel from people up through the ranks to a large extent. It, obviously, didn't require a Harvard or University of Chicago MBA. People started out on the floor. If they had the ability and the competence and the dedication, they could rise up through the company and become important management people.

Basically, the company educated its own management. That meant people who were company men who were with the company for many years with lots of experience with them. It meant, at least, if the witness here were any indication, a tendency to have people manage that were big, strong, husky fellows without particularly sophisticated educational backgrounds, who were direct, strict, somewhat rough around the edges, and comfortable on the production floor.

Certainly, Mr. Grohs fit into that mold. His production evaluations in

1976, 1977, 1978, and 1979 were all acceptable. Under the company terminology, acceptable was considerably better than marginal. It meant not somebody who was a star but somebody who was performing at a very capable level.

In 1980, the evaluation definitions got changed somewhat. Mr. Grohs was rated as competent plus, close to outstanding and, in 1981, strong competent. Certainly, on the basis of the company's own evaluation of him, he was: a strong, able, experienced board plant superintendent; quite clearly strict; not terribly flexible and, when he thought it was necessary, a headknocker; at times, a tough boss. But that was,

the evidence certainly indicated to me, the role that his employer wanted him to play, at least until the time of the reopening and the effort to decertify.

There were substantial merit increases. He was kept on during the shutdown. He was sent elsewhere in the country to train people. He was a good, strong performer, and he was terminated.

I think the biggest disputes in the evidence, actually, concerned what role did Spitz play in the termination. On that one, I disagree with plaintiff's counsel. I don't think he played much of a role.

Was there a conference call on April 28, 1983? I am inclined to believe that there was not. It is unlikely that he would have gotten involved in a personnel decision three levels down, but he certainly had told Sarvis what he wanted.

He didn't want a union, and Sarvis was responsible, from late March on, for Waukegan.

Mr. Spitz had suggested Mike Ward as well as possible others as somebody who would be good in Waukegan. What was clear is that Mr. Ward was another person who had come up through the ranks who was a no-nonsense guy.

Sarvis certainly understood that the key objective of no union, decertification, which would take some stroking of a new work force to win that, that that did mean good labor relations, call it sharing and caring or what else, or whatever you want to

call it. Michael Ward certainly knew that, too, and that they had 90 days, basically, to turn it around. That meant to Sarvis and Ward that even though Ward wasn't himself a particularly sharing and caring kind of person -- like I said, he came out of somewhat the same kind of mold as the plaintiff -- he wanted supervisors who wouldn't upset the hourly employees unduly. Both of them were certainly aware that stroking wansn't one of plaintiffs's strong points.

Finally, it was clear that Mr. Ward was also aware that he wanted and needed Roth, and Roth didn't particularly like the plaintiff.

Where does that leave us? I do believe that because of the immediate objective, the fact that plaintiff was one kind of supervisor or the kind of supervisor, basically, that the company

had raised him to be, which was not totally what they had in mind during the immediate future at Waukegan, that that was a factor. But I'm also persuaded that age was a factor.

Sarvis testified that Spitz referred to the plaintiff as "old and fat." I don't find Sarvis a particularly credible witness. I must say that when he said that, I thought to myself: I think Mr. Sarvis is verbalizing something that he thought back at the time all this hapened in 1983. Certainly, on the basis of Mr. Ward's testimony -- and in that sense, I believe that -- that Sarvis leaned on him a little bit to get rid of Grohs.

There was a feeling that plaintiff was expendable, and

it didn't make any difference that he had been there for more than 20 years. They didn't choose to try to teach an old dog new tricks. So the first thing is to encourage his resignation by slating him to be a guard and then, when that didn't happen, fire him 16 days after Mr. Ward arrrived on the scene.

The plaintiff had a strong record as a production superintendent, over 20 years with the company. I could not help but conclude that if he had been, say, 30, given the kind of production supervision record that he had, the company would have sought to teach him new tricks to the limited extent that that was necessary or, at minimal, a transfer. Instead, there was a discharge, and then what I must say I look upon as a whole laundry list of irrelevancies.

Now, I made up a list. I want to go through them. I may be a little in error on some of them.

Well, there was a speech -- it was a little unclear whether this was back in 1979 or it was in 1981 -- where the plaintiff in effect said to people: shape up, or you're going to ship out -- which upset employees but, which as I understood the evidence, was about where the company was coming from at the time; and that what he was saying was not more than what other people were saying or at least thinking with regard to the Waukegan plant.

We had certain incidents as to what did or didn't happen in social settings off the premesis on a couple of occasions two

years, three years, prior to termination in circumstances where there were no grievances, where it didn't seem to cause much of a ripple at the time in terms of continuing relationships within the company at the plant, which kind of got dredged up when somebody had to come up with a list for EEOC.

I saw Mr. Grohs testify. I heard him. Do I think that he is capable of some heavy-handed humor that is pretty tasteless? Sure, I think, Mr. Grohs, that you're capable of that. But if every indiscretion by every employee at some Christmas party, fueled by a little alcohol, over the years is cause for termination after 20 years two and three years after the event, the casualty list of old-time employees would be long, indeed.

What do we know? We know that there was a claim of an incident in June of 1981. I must say, I can't remember which one was supposed to -- I guess that was the one involving Darlene Ramig, who did testify that she didn't remember it when first interviewed in 1984. Certainly, the evidence indicates that it just didn't make much of a stir at the time, and there just wasn't any aftermath, if it ever happened.

I'm inclined to believe that, yes, there was a heavy-handed, tasteless, humor-type remark. As I recall the evidence, at the same time, Miss Ramig was calling Mr. Grohs a fat s.o.b. I don't know how it ends up as something on a list of susbstantial causes for discharge two years later, more than two

years. Well, about two years later.

The alleged matter involving Miss Parkman, while it's a little hard to tell whether anything like that even occurred and, if so, it certainly ends up down the memory hole in the sense that there is no official reprimand, there is nothing in the personnel records. Again, it doesn't seem to have left any significant trauma. Again, it's dredged up long after the event.

The same with regard to the remark regarding Miss Parkman which Miss Ramig testified to: They are pretty much in the same boat.

Then we have rumors -- who knows? -- this claim that the plaintiff may have been the source of certain rumors and may have scratched himself, he may have done this, he may have done that, all of which just is sort of plant gosssip kind of things that are used to haunt somebody

long after the event. If they had been a matter of concern to management at the time, if they had been a matter of concern to people who were involved in it, if, in fact, they ever happened, one would expect that they would be a matter of concern contemporaneously and not on a laundry list long afterwards.

Board tagging. I was certainly persuaded by Mr. Coventry and, after that, I believe Mr. Qualls' testimony, that that was one of the plaintiff's jobs, to make a judgment as to whether things could go out. If he made a judgment as to whether things could go out, they went out.

The employees didn't like him. Plaintiff conceded that there undoubtly were employees that didn't like him. Given the nature of what he was supposed to do, which was to be a relatively strict boss, it would be surprising if there were some that didn't.

But I looked at the grievances. If a company or plant has serious morale problems, serious problems with a particular supervisor, there are going to be lots of complaints and lots of grievances. There just weren't really any grievances. The occasional one, which the company -- one, Roth testified filing grievances about 50 percent of the time on complaints, and there weren't many with respect to the plaintiff.

Sabotage? A couple of group acts that were unrelated to the plaintiff.

Equipment, not up to snuff? Well, that was basically, by the testimony, Mr.

Qualls' overall responsibility, and a recognition that there was no basis for taking any action against him because of equipment problems.

Somewhat more serious, did Mr. Grohs call Campbell and Phil Pippens "nigger" at some point? It may have happened. But, again, there was no grievance. It happened long before the discharge decision. It was unclear whether it ever happened.

On "boy", I was persuaded that, yes, this was Mr. Grohs' appellation, virtually everybody. He was told that Campbell didn't like it, and he did quit, and he should have understood.

before anybody brought it to his attention that that was an inappropriate word to use.

But, again, a failure to deliver a note at some time, one grievance, where somebody wasn't permitted to go home with, long after the event, a reinstatement but without backpay.

It was a laundry list. I suppose one equivalence of a laundry list is a pretext list. I get back to the conclusion that all of that was, for the most part, meaningless. Management did want a little softer supervision. So that that was a factor, but it was a factor related to the plaintiff's age in the sense of they were, in effect, saying: And we're not going to take a chance with him. He has been set in his way too long; he is too old, and he is expendable.

That's why I come out the way I come out. Where does that leave us?

Mr. Lieberman: Well, I just heard Your Honor rule, and that will be the ruling, I take it, against us.

Ms. Baliunas: Your Honor --

The Court: It could have been worse. I could have found a willfull violation, and I don't think that was it.

Ms. Baliunas: Dennis has not been gainfully employed in four years. Is it possible for him to get reinstated?

The court: That is a normal remedy, but I think maybe you people ought to talk to each other first.

Mr. Lieberman: We will certainly do that.

Ms. Baliunas: Could you set a time for us to come back? Because I would really like to get the back-pay issue straightened out as quickly as possible, get him back to work if we can. He still has 15 more good years on him. Could you give us a date to come back, Judge, if we can't straighten this out? Then we would petition you.

The Court: Why don't we figure on -- do you want to give it a week and figure on getting together next Friday?

Mr. Lieberman: Fine, Judge.

Ms. Baliunas: What time did you want us to be here, Judge?

The Court: Say, 2:00 next Friday?

Ms. Baliunas: Fine. Thank you, Your Honor.

Mr. Lieberman: Thank you, Your Honor.

The Plaintiff: Thank you, Your Honor.

The Court: It's better that you hold on to these than I.

Ms. Baliunas: Thank you, Judge.

The Court: I think that's it.

(proceedings concluded.)

I, K. Joseph Snyder, do hereby certify that the foregoing is a partial, true, and accurate transcript before the Honorable James B. Moran, on February 20, 1987.

(1283) Dennis Grohs,

Plaintiff-Appellee

Cross-Appellant,

v.

GOLD BOND BUILDING PRODUCTS, A DIVISION OF NATIONAL GYPSUM COMPANY.

Defendant-Appellant,

Cross - Appellee.

Nos. 87-1527. 87-1548

United States

Court of Appeals,

Seventh Circuit

Argued Nov. 13, 1987

Decided Sept. 27, 1988.

As amended Sept. 29, 1988.

As Amended on Denial of Rehearing and Rehearing En Banc Nov. 2, 1988.

Discharged supervisor filed age discrimination suit against former employer. The United States District Court for the Northern Disrtrict of

Illinois, Eastern Division, James B. Moran, J., determined that former supervisor had successfully established prima facie case of age discrimination and that employer's articulated nondiscriminatory reasons for discharge were manufactured. On appeal, the Court of Appeals, Kanne, Circuit Judge, held that articulated reason for supervisor's discharge, difficulty getting along with his peers, was not pretext for age discrimination.

Reversed.

See also 627 F. Supp. 1555.

1. Civil Rights 44(6)

Age discrimination plaintiff may meet his burden of persuasion at trial directly by presenting direct or circumstantial evi-

(1284) dence that age was determining factor in employee's discharge or indirectly through burden shifting analysis. Age discrimination in Employment Act of 1967, 1 et seq., as amended, 29 U.S.C.A. 621 et seq.

2. Civil Rights 9.10

For purposes of determining whether unlawful discrimination has occured, discharged employee's "qualification" for job depends upon whether employee meets employer's legitimate expectations, measured as of time of discharge;thus, qualification may change from time to time and fact that individual may have been qualified in the past does not mean that he is qualified at a later time.

See publication Words and Phrases for other judicial constructions and definitions.

3. Civil Rights 9.15

Articulated reason for 51 year old supervisor's discharge, his difficulty getting along with his peers, was not pretext for age discrimination-even though supervisor formerly was qualified for position despite his "disastrous" labor relations skills, in light of employer's adoption of new management policies placing greater emphasis on labor management relations. Age Discrimination in Employment act of 1967. 1 et. seq., as amended, 29 U.S.C.,A. 621 et seq.

Richard E. Lieberman, Ross & Hardies, Chicago, Ill, for defendant-appellant -cross appelee.

Kathleen Baliunas, Chicago, Ill, for plaintiff-appelee/Cross appellant.

Before Posner, Flaum, and Kanne, Circuit Judges.

Kanne, Circuit Judge.

The claim in this case is one of age discrimination. At age 51, Dennis Grohs was fired by his employer of 22 years, Gold Bond Building Products, allegedly because he had difficulty getting along with his peers. Grohs filed an age discrimination suit.

A bench trial was held in district court. Judge Moran, in an oral ruling from the bench, found that Gold Bond was guilty of a nonwillful violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 et seq ("ADEA").

Both parties appeal; Gold Bond claiming that there was no ADEA violation; and Grohs claiming that the violation was willful. Because there was insufficient evidence to support a finding that age was determinative factor in Grohs' dismissal, we reverse.

I.

Gold Bond, a division of National Gypsum Co., manufactures wallboard at a plant in Waukegan, Illinois. In 1979, Dennis Grohs became the Waukegan board plant superintendent. During the early 1980's the plant suffered a substantial decline in business and a large number of employees were laid off. In February, 1983, the plant was shut down indefinitely retaining only four supervisors to act as custodians of the equipment. This skeletal staff consisted of Dennis Grohs and three others.

Gold Bond reopened the plant on a 90 day trial basis in early 1983. The company's upper management had attributed the plant's earlier problems to a very bad labor relations environment, particularly in terms of the relationship between the supervisors and the hourly employees. Consequently, Gold

Bond decided to implement a new management philosophy with greater emphasis on improving the labor relations atmosphere. because of this new focus, Gold Bond's management viewed a cooperative attitude as a critical element in keeping the plant open afer the trial period.

Michael Ward, the new plant manager, was assigned to reopen the plant, to improve employee relations, and to begin operating successfully within 90 days. He began by reviewing the performance records of the four members of the plant's skeletal crew. Ward's review of Dennis Grohs' was three written evaluations re-

(1285) vealed that Grohs had experienced significant problems with labor relations.

In addition to the written record, Ward was provided with information concerning Grohs by other individuals from Gold Bond's management. Included among these were reports that Grohs had been a "disaster" in terms of his labor relations with the employees in his role as plant board superintendent. The former plant manager, Tom Brooks, informed Ward that Becky Parkman, the personnel safety supervisor, had complained that Grohs had pulled her on to his lap and grabbed her by the crotch during a supervisor's dinner and that later Grohs spoke of Parkman and another female employee as lesbians. Brooks also relayed information to Ward from Darlene Ramig, the payroll sec-

retary, to the effect that Grohs had told her that he would help her get promoted if she would go to a nearby motel with him.

Jon Roth, the former union president, told Ward that Grohs was "the root cause of most labor management problems at the plant and that the union had repeatedly complained to management about Grohs' actions". Roth also told Ward that black employees were outraged by Grohs' racist references to them as "nigger" and "boy".

After receiving these reports of Grohs' conduct 1/ from both Roth and Brooks, reviewing Grohs' file, and personally observing Grohs, Ward decided that Dennis Grohs' did not have the new "cooperative attitude" that Gold Bond needed for the 90 day trial period. Consequently, on April 29, 1983, Ward concluded that Grohs was not qualified

to remain in his supervisory position and discharged Grohs. 2/ not serve as a security guard.

Grohs filed an age discrimination suit pursuant to 29 U.S.C. 636. A bench trial was held before Judge Moran who determined that Grohs successfully established a prima facie case of age discrimination and that Gold Bond's articulated nondiscriminatory reasons for the discharge were manufactured. The judge made a factual determination that Gold Bond had created a "laundry list" or "pretext list" to justify Grohs' dismissal. 3/ Both parties appeal to this court.

1/The company had other complaints concerning Grohs' conduct, that he "fondled genitals in a lewed and public manner" in front of female employees, that he circulated personal rumors among the plant, that employees sabotaged equip-

II.

This court has held that the critical issue in age discrimination suits is not whether age was the sole factor, but rather, whether age was a "determining" factor, in that plaintiff would not have been discharged but for his age. La Montagne v. American Convenience Prods.,Inc, 750 F.2d 1405, 1409 (7th Cir.1984); Kier v. Commercial Union Ins.Co., 806 F. 2d 1254, 1257 (7th Cir.1987) cert denied, U.S. 107 S. Ct.1965 It was Grohs' burden of proof to "show" that he was dis-

ment as a way of getting back at Grohs.

2/ Gold Bond assigned Grohs to a position as security guard five or six days before his discharge. After he was discharged as a supervisor, Grohs did not serve as security guard.

crimated against because of his age. Golomb v. Prudential Ins. Co. of North Am., 688 F.2d 547, 550 (7th Cir., 1982) (emphasis in original). [1]The plaintiff may meet his burden of persuasion at trial in one of two ways. First, he may meet it directly, by presenting direct or circumstantial evidence that age was a determining factor in his discharge. Mathewson v. National Automatic Tool Co., 807 F2d 87, 89-90. (7th Cir. 1986) La Montagne, 750 F. 2d at 1409. Second, he may meet it in directly by utilizing a variation of the Supreme Court's burden-shifting analysis for resolving Title VII cases. This analysis was first set forth in McDonnell Douglas Corp v. Green, 411...

(1286) U. s. 792, 98 S. Ct. 1817, 36 L.Ed.2d 668 (1973), and elaborated and clarified in Texas Dept. of Community Affairs v. Burdin, 450 U.S. 248, 253-56, 101 S. Ct. 1089, 1093-95, 67 L. Ed.2d 207 (1981). This analysis as applied to ADEA cases requires that a plaintiff who files an ADEA claim must show that he:

(1) belongs to the protected class (age forty or older);

(2) was qualified for his position;

(3) was terminated, and

(4) was replaced by a younger person. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1204 (7th Cir. 1987). When a plaintiff establishes these criteria, he has made a prima facie case of age discrimination and burden shifts to the

3/ The charges Gold Bond made against Grohs were largely complaints about his personality and lack of ability to get

along with others and ranged from scratching his crotch to using words like "nigger" and "boy" to refer to workers. There was testimony during the trial that Grohs was hated by the hourly employees and that various female employees had accused Grohs of sexual harassment.

defendant to show that plaintiff's discharge was a result of "some legitimate, nondiscriminatory reason." If the defendant meets this challenge, the burden again shifts to the plaintiff to prove that the reasons for the discharge were merely a pretext for discrimination. McDonnell, 411 U.S.at 802-05, 93 S. Ct. at 1824-25 Graefenhain v.Pabst Brewing Co.,827 F.2d 13, 17-18 (7th Cir. 1987).Bechold v.IGW Sys. 817 F. 2d 1282, 1284 (7th Cir 1987) La Montagne, 750 F. 2nd at 1409 Metz, 828 F. 2d at 1204.

Once the case has been tried, however the rules about the prima facie case, defendant's response and methods of proof no longer are relevant. The remaining issue is whether there was sufficient evidence to support a finding that age was a determinative factor in defendant's dismissal of the plaintiff.

Kier,808 F. 2nd at 1257; accord United States Postal Service Bd. of Governors v. Aikens, 460 U.S.711, 715, 108 S. Ct. 1478, 1482,75L. Ed 2d 403 (1983) Pollard v. Rea Magnet Wire Co. 824 F. 2d 557, 558 (7th Cir. 1987) cert denied -U.S.-,106 S.Ct. 488, 96 L. Ed 2d 486 (1987) (Title VII) Benzies v. Illinois Dept. of Mental Health, 810 F. 2d 146, 148 (7th Cir, 1987). cert denied, -U.S.- 107 S.Ct. 3231, 97 L.Ed 2d. 737 (1987) (Title VII) Mathewson, 807 F.2d at 90 (ADEA); Morgan v. South Bend Comm. School Corp. 797 F.2nd. 471, 480 (7th Cir 1986) (Title VII.) To do this, the plaintiff must show that defendant's proffered reasons for discharge were pretextual.He must demonstrate that (1) the proffered reasons had no basis in fact, (2) the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge.

Kier, 808 F. 2nd at 1259.

In examining the district court's findings, we operate under the clearly erroneous standard of review. Anderson v. City of Bessemer City, 470 U.S. 564, 572, 105, S.Ct 1504,84 L. Ed 2d 518 (1985) Bechold, 817 F. 2d. at 1285.

III.

The district judge made a factual finding that Dennis Grohs was a "good, strong performer, and he was terminated." The judge indicated that he was "persuaded that age was a factor" in Grohs' termination, characterizing Gold Bond's reasons for Grohs' discharge as"a whole laundry list of irrelevancies." He stated that management's desire for "softer" supervision was a factor related to Grohs' age with the sense that... he is too old." In his oral ruling the judge said:

> There was a feeling that plaintiff was expendable, and it didn't make any difference that he had been there for more than 20 years. They didn't choose to try to to teach an old dog new tricks Management did want a little softer supervision. So that was a factor, but it was a factor related to the plaintiff's age in the sense of they were, in effect saying: and we're not going to take a chance with him. He has been set in his ways too long, he is too old, and he is expendable.]

On the othere hand, the district judge also found that Gold Bond had adopted a new 90-day strategy in an attempt to "do or die," and that the company wanted decertification of its union and improved labor relations. The court found that Grohs' personality did not fit with the "new" image or stratedgy of the "new" company. Grohs' supervisory style was that of a "head knocker," the court said. "[S]troking [the work force] wasn't," the court conceded, "one of plain-

tiff's strong points." Gold Bond claims that these findings were not

(1287) consistent with a finding of age discrimination.

In support of that claim, Gold Bond first alleges that there was no direct evidence of discrimination. We find this to be true. Plaintiff's proffered direct evidence was the testimony of Robert Spitz, Vice President of Operations, instructed Ward to fire Grohs because he was "too old and too fat for the job." The opinion of the district court explicitly discredited this testimony. "I thought to myself." the district judge said, "I think Mr. Sarvis is verbalizing something that he thought back at the time all this happened in 1983" (emphasis added). The district judge opined that "Sarvis leaned on [Ward] a little bit to get rid of Grohs." Plaintiff improperly characterizes this as a finding by the district court that Sarvis himself was

the discriminator. This contention, however, has absolutely no support in the record.

Nor is there any indirect evidence that age was a dertermining factor in Gold Bond's decision to terminate Grohs' employment. The district court characterized Gold Bond's reasons for discharging Grohs as a "laundry list" and a pretext list." It appears to have done so in part because all of the instances of Grohs' behavior of which the company received complaints occurred two and three years before Grohs' employment was terminated. We recognize that "evidence that the proffered reason for the discharge was something so far removed in time from the discharge itself that it is unlikely to have been the whole cause, even if a part of it," La Montagne 750 F.2d at

1415, can constitute evidence that such proffered reasons are not the sole determining factors. The Gold Bond plant, however, had been shut down since February, 1982. The company had implemented new supervisory standards, requiring skill in labor relations, for the 90-day trial period. Thus, it was necessary to reevaluate the supervisory staff in light of these new standards. The most recent information regarding Grohs' supervisory performance that was available was information dating from 1980 and 1981.

[2] Gold Bond argues as well that even though Grohs formerly was qualified for his position, despite his deficient labor relations skills, the adoption of new management policies allowed it to reevaluate Grohs, and dismiss him because he was no longer qualified. We find that this argument has merit.

Whether one is "qualified" for one's job depends upon whether one meets one's employer's legitimate expectations. Dale v. Chicago Tribune Co., 797 F2d 458, 463 (7th Cir.1986), cert. denied, 479 U.S. 1066, 107 S.Ct. 954, 93L. Ed. 2d 1002 (1987); Huhn v. Koehring Co., 718 F. 2d 239, 244 (7th Cir. 1983). The employer's expectations are measured at the time the employee is discharged. Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1425 (7th Cir. 1986). Thus, whether one is qualified may change from time to time. The fact that an individual may have been qualified in the past does not mean that he is qualified at a later time. As we said in Kephart v. Institute of Gas Technology, 630 F. 2d 1217, 1219 (7th Cir. 1980), cert. denied,450 U.S. 959, 101 S. Ct. 1418, 67 L. Ed. 2d 383 (1981):

> Qualification obviously depends on the nature of [the employer's] business at any given time. One year an outgoing business-getter type might be best qualified, while in the next, after the business was got, it might be a cloistered scientist, or mathematician. To ignore the shifting nature of qualification from time to time would make the qualification requirement [in plaintiff's prima facie case] meaningless...

[3] Thus, although Grohs' performance as a supervisor was adequate in the past, Gold Bond's new emphasis on labor management relations during the 90-day trial period meant that Gold Bond could find that Grohs was no longer qualified and discharge him. See Jang v. Biltmore Tire Co., 797 F. 2d 486, 489-90 (7th Cir. 1986) (fact that plaintiff was qualified in the past did not rebut defendant's explanation that plaintiff lacked specific qualifications necessary to fulfill the changing job description; hence, no ADEA violation occurred).

(1288)Here, the district court found that Gold Bond wanted to implement a "softer" management style at the Waukegan plant. It also found that Grohs' supervisory approach was that of a "head knocker." The district judge stated that "I do believe that because of the immediate objective [of improving labor-management relations]. the fact that plaintiff was one kind of supervisor... which was not totally what [Gold Bond] had in mind during the immediate future at Waukegan, that that was a factor [in Grohs' dismissal]." In the past, we have held that lack of ability to get along with others, with employees in particular, was a legitimate, nondiscriminatory reason for terminiating someone's employment. See, e.g., La Montagne, 750 F 2d at 1414 (plaintiff's problems communicating with his superior

created divisiveness among employees); Parker v. Federal Nat'l Mortgage Ass'n, 741 F. 2d 975, 979 (7th Cir. 1984) (plaintiff was "not personable, ordinarily a shortcoming for one in a supervisory position").

Thus, as long as Ward's belief that Grohs was not qualified to continue in a supervisory position with Gold Bond was genuinely held, it is not, by definition, a pretext for firing Grohs on account of his age. Pollard, 824 F. 2d at 559, Bechold, 817 F. 2d at 1285 (when an employer advances a reason unrelated to a characteristic covered by the statute, the issue "becomes one of credibility in determining whether the belief is genuinely held"); Dorsch, 782 F. 2d at 1426. As noted above the district judge found that Grohs' management style was not, "what [Gold Bond] had in mind," that it wanted a

"softer"style of supervision, and that Grohs' supervisory style was rather that of a "head knocker."

There is, moreover, insufficient evidence showing age discrimination to the contrary. Employment discrimination cases often involve sensitive and difficult issues of fact. Aikens, 460 U.S. at 716, 102 S.Ct. at 1482. The evidence of discriminatory intent in this case was sparse. Therefore, it is not surprising that the district judge's oral findings of fact simply do not reflect evidence of age discrimination. There is insufficient proof of disparate treatment, especially in light of the fact that Ward is only three years younger than Grohs, one of the new supervisors is merely five years younger, one is fifteeen years younger, and the third is actually two years older. 4/ Although Ward's deposition

testimony indicates that he thought Grohs was 54, not 51, at the time he was terminated, it thus seems unlikely that Ward thought someone even six years his seniour was too old. It is true that Jon Roth, who was 43 at the time was hired in spite of his people problems. As plaintiff points out in his brief, however, Roth was hired as a supervisor because he was the union president. In supervisory capacity, Roth could not act on behalf of the union, and the company would have an easier time achieveing decertification. This is consistent with Gold Bond's new 90-day strategy, rather than constituting evidence of age discrimination. 5/

Thus, we find that age was not a determinative factor in Gold Bond's decision to terminate Grohs. Grohs was

fired because he was no longer qualified for his position under the new management style. The decision to terminate Grohs under these criteria had a basis in fact, because the district judge found that his lack of supervisory abilities was a factor in his dismissal. Even if the allegations about Grohs

4/ At the time he terminated Grohs, Michael Ward was 48 years old, three years younger than Dennis Grohs. The three men who were hired as new supervisors, after Grohs' dismissal, were aged 36, 43, and 53.

5/ Gold Bond conjectures that the district court's holding was based on a subjective feeling that Grohs was not terminated for just cause. By speculating that this simply was a case of the company refusing to "teach an old dog new tricks," the district court, Gold Bond argues, was improperly substituting its own standards of fairness and business judgment for that of the defendant. It is true, of course, that the ADEA "was not intended as a vehicle for judicial review of business decisions." Kephart, 630 F. 2nd at 1223. We also have said that "it is not the court's duty to determine the validity of the defendant's business decision as long as the decision was made in good faith." Dorsch, 782 F. 2d at 1426.

were not true. Ward genuinely believed that they were. Lack of supervisory skills is, as discussed above, sufficient to motivate the discharge of an employee. Here, there is little or no direct or indirect evidence that Grohs' discharge was brought about by any concerns other than his ability to supervise employees in a "softer" manner.

It is the task of the apellate court to "determine whether the trial judge's interpretation of the facts is implausible, illogical, internally inconsistent or contradicted by documentary or other extrinsic evidence." Ratliff v. Milwaukee, 795 F. 2d 612, 617 (7th Cir. 1986). Gold Bond claims that the district court's characterization of the company's stated reasons for dismissing Grohs as a "pretext list" does not fit with the

court's other findings. The trial court incongruously made factual findings that Grohs' supervisory style was that of a "head knocker" and that Gold Bond had adopted new "softer supervision" policies to which Grohs did not conform. Oral findings by any judge may sometimes be internally inconsistent. We find that to be the case here. In some cases such inconsistencies may be reconciled on appeal. Here, however, the lack of evidence makes such reconciliation impossible. Thus, based on the district court's contradictory findings, the determination that Gold Bond's termination of Grohs was a result of age discrimination and not based on legitimate business reasons, was clearly erroneous.

IV.

Grohs requests this court to find that the age discrimination was a willful violation of the ADEA. Grohs contends that there was sufficient evidence in the record to support this finding, and that the court erred by neglecting to charactearize Gold Bond's misconduct as willful.

Because we find that Gold Bond did not violate the ADEA, we need not address the issue of whether that alleged violation should have been characterized as willful or nonwillful.

V.

The evidence in the record is insufficient to find that age was a determinative factor in plaintiff's dismissal, constituting a violation of the ADEA. We therefore Reverse.

DEFENDANTS STATEMENT OF FACTS

Gold Bond, a division of National Gypsum Company, operates a plant in Waukegan, Illinois, which manufactures wallboard (Ward, Tr. 140; Grohs, Tr. 311). Grohs became the plant's board plant superintendent in 1979 (Grohs, Tr. 309).

In the early 1980's, the Waukegan plant underwent a substantial decline in business (App. at 2). In October, 1981, the Company laid off a large number of hourly and salaried employees (Lynch, Tr. 96; Coventry, Tr. 239-40). The downturn continued, however, and in February, 1982, the Company shut the plant down indefinitely (Lynch, Tr. 92,92, 104). It retained a skeletal staff of four supervisors, including Grohs, to act as custodians of the equipment (Lynch, Tr. 94-95). The

Waukegan plant manager, Thomas Brooks, transferred to the Company's Phoenix, Arizona plant (Lynch, Tr. 90, 97; Ward, Tr. 182).

In early 1983, the Company reopened the Waukegan plant on a 90-day trial operation (Lynch, Tr. 81, 102; Ward, Tr. 144, 202-03). Upper management determined that the earlier failure of the plant to operate successfully had resulted in large part from exceedingly poor relations between management and hourly employees (App. at 2; Lynch, Tr. 81-81; Ward, Tr. 203; see also Roth, Tr. 405-06). Thus, management decided that if, within the 90-day trial period, the reopening of the plant could be accomplished under an employee relations atmosphere conducive to profitability, it would remain open (App. at 2). The decision was made, therefore, to

implement a new management phillosophy which would place great emphasis on improving the labor relations atmosphere at the plant, including more harmonious relations between supervisors and employees and the creation of a working environment in which the workforce would take steps to decertify its union (Sarvis, Tr. 43-45; Lynch, Tr. 86-88; Bavis, Tr. 127-128; Ward, Tr. 202-03, 210; Def. Ex. 15). If the experiment did not work, Gold Bond was going to shut the plant down permanently (Ward, Tr. 202-03).

The Company named Michael Ward, then age 48, as the new plant manager (Lynch, Tr. 91; Ward, Tr. 139). Ward had been with the Company for 27 years, most recently as the Phoenix plant production superintendent (Ward, Tr. 139-41, 204). Robert Sarvis, then Director of Manufacturing and Ward's immediate supervisor, specifically instructed Ward that he had only 90 days to begin operating the plant successfully (Sarvis, Tr. 43-45; Ward, Tr. 202-03). Ward was told that he was to place great importance on improving employee relations (Sarvis, Tr. 43-45; Ward, Tr. 203).

Shortly before taking over as plant manager, Ward asked Brooks (the former plant manager) for his thoughts about the strengths and weaknesses of the employees (Ward, Tr. 205). Brooks advised Ward that Grohs had a great many

problems dealing with plant employees, and was disliked -- even hated -- by most of the hourly employees (Ward, Tr. 207). Brooks also cited complaints from female employees that they had been sexually harassed by Grohs. Becky Parkman, the personnel safety supervisor, had told Brooks that Grohs had grabbed her by the crotch during a supervisors' dinner and, a few months later, referred to her and another employee as lesbians (Ward, Tr. 206). Brooks also said he had been told by Darlene Ramig, the payroll secretary, that Grohs had suggested he would help her get promoted if she went to a nearby motel with him (Ward, Tr. 207). 1/ Upon arriving at the Waukegan plant in April, 1983, Wards reviewed the recent performance apraisals of the four remaining employees (Ward, Tr. 212-13).

Each of Grohs' last three appraisals ranked him low in the area of employee relations (Def. Exs. 1-3; Ward, Tr. 213-14). 2/

1/ Parkman independently confirmed these incidents when questioned by Ward (Ward, Tr. 214-17). Ramig confirmed these incidents involving her in her testimony (Ramig, Tr. 433-38).

2/ Plaintiff's 1980 appraisal describes him as "weak in labor relations" (Def. Ex. 1), his 1981 appraisal notes that he had "improved in labor relations but still needs to work on developing a little more finesse" (Def. Ex. 2), and his 1982 appraisal states, under the category "Labor Relations": "Was not very strong. Employees did not accept him. Needs to use more finesse in handling people." This last appraisal also states: "Dennis should attend a Human Relations Seminar. Needs to develop ability to relate to his employees on a more understanding level.
Does not have a strong working relationship with some of his peers" (Def. Ex. 3) See also (Coventry, Tr. 261-62, 269).

Jon Roth, who had been the union president at the Waukegan plant for 20 years, told Ward that the rank-and-file employees "hated" Grohs, that he was the root cause of most labor-management problems at the plant, and that the union had repeatedly complained to management about Grohs' actions (Ward, Tr. 217-20; Roth, lTr. 405, 413, 415). 3/ In addition, Ward received information from Roth that black employees had been outraged by Grohs' racist references to them as "nigger" and "boy" (Ward, Tr. 219; Roth, Tr. 408-11, 415). On another occasion, an employee has asked Grohs for time off to take care of a sick child, and Grohs had told the employee it was "your goddamn problem" (Ward, Tr. 219-20).

3/ Thomas Lynch, the Company's labor relations attorney, likewise told Ward that during the most recent negotations with the union in 1981, Roth and other union negotiators had specifically

complained to management about Grohs. The union negotiators named Grohs as the primary offender in not caring about the employees (Lynch, Tr. 118-19; Ward, Tr. 177-0178, 220; Roth, Tr. 411-13). Sarvis also cautioned Ward about Grohs (Ward, Tr. 208-09).

Given the strict time constraints he was working under, the specific directive to create a harmonious employee relations environment, the virtual flood of negative information regarding Grohs' weakness in that area, and his own observations, Ward concluded that Grohs' continued employment would endanger the success of the 90-day trial period, thereby threatening the continued existence of the Waukegan operations. He decided, therefore, to discharge Grohs (Ward, Tr. 154-155, 220-21).

On April 29, 1983, Ward and Thomas Lynch, the Company's labor relations attorney (who was at the plant on other business), met with Grohs to inform him that he was being discharged. Ward explained to Grohs that he was being discharged for his

"people problems" with both the hourly employees and his peers, and that due to Grohs' inability to handle people, he could not fit in with the Company's new emphasis on improved employee relations (Lynch, Tr. 119-21; Ward, Tr. 170-71, 222-23; Def. Ex. 4).

As the start-up progressed, Ward hired Roth, age 43, Junior Henkel, age 53, and Herman Fraley, age 36, as new supervisors (Ward, Tr. 192-93, 224; Roth, Tr. 404-05).

SUMMARY OF ARGUMENT

In its ruling, the district court rejected all of plaintiff's alleged direct evidence of age discrimination, finding plaintiff's witness on these facts to be incredible (Appendix at 5-6). Accordingly, the district court based its decision on indirect evidence under the shifting burdens set forth in McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973). The district court

erred in finding (1) that plaintiff met his burden of establishing a prima facie case of discrimination; and (2) that defendant's articulated nondiscriminatory reason for the discharge was pretextual.

In its findings of fact the district court accepted as completely true that Gold Bond had instituted new standards of conduct for its supervisors when it decided to reopen the Waukegan plant for a 90-day sink or swim trial period in 1983. The district court found that the company wanted "softer supervision" (App. at 11) which " ...wouldn't upset the hourly employees..."(App. at 6).

In addition, the district court found that the plaintiff's supervisory style was that of a "head knocker" (App. at 4) and that "stroking" the workforce"... wasn't one of plaintiff's

erred in finding (1) that plaintiff met his burden of establishing a prima facie case of discrimination; and (2) that defendant's articulated nondiscriminatory reason for the discharge was pretextual.

In its findings of fact the district court accepted as completely true that Gold Bond had instituted new standards of conduct for its supervisors when it decided to reopen the Waukegan plant for a 90-day sink or swim trial period in 1983. The district court found that the company wanted "softer supervision" (App. at 11) which " ...wouldn't upset the hourly employees..."(App. at 6).

In addition, the district court found that the plaintiff's supervisory style was that of a "head knocker" (App. at 4) and that "stroking" the workforce"... wasn't one of plaintiff's

strong points" (App. at 6).4/ Indeed, the district court specifically found that Grohs' supervisory history demonstrated to the new plant manager at Waukegan that

4/The district court's findings of fact also characterized Groh's supervisory style as being"...quite clearly strict; not terribly flexible" (App. at 4). Grohs was, in district court's view, "a tough boss" (App. at 4).

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 29, 1988

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

Dennis Grohs,

Plaintiff-Appellee,

Cross-Appellant.

No. 87-1527 and

87-1568

v.

Gold Bond Building Products,

A division of National Gypsum

Company,

Defendant-Appellant.

Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 7999

James B. Moran, Judge.

ORDER

The slip opinion published in the above-entitled case on September 27, 1988 is hereby amended as follows:

Page 9, first full paragraph, line 10, the word "by" should be deleted.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

November 2, 1988

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

Dennis Grohs,

Plaintiff-Appellee,

Cross-Appellant,

Nos. 87-1527 and

87-1568

v.

Gold Bond Building Products,

A division of National Gypsum Company,

Defendant-Appellant,

Cross-Appellee.

Appeals from the United States District court for the Northern District of Illinois.

No. 84 C 7999

James B. Moran, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing and suggestion for rehearing en banc be, and the same are, hereby Denied.

It is further ordered that the opinion issued in this case on September 27, 1988, is hereby Amended to reflect the following corrections:

(1) On page 2, the first line in the first full paragraph, the word "John" is changed to "Jon."

(2) On page 7, twelfth line in the first full paragraph, the word "Spitz]" is changed to "[Ward]".

(continued)

(3) On page 10, first line of the first paragraph, the balance of the paragraph commencing with the word "It" is deleted and the following is added:

Although Ward's deposition testimony indicates that he thought Grohs was 54, not 51, at the time he was terminated, it thus seems unlikely that Ward thought someone even six years his senior was too old. It is true that Jon Roth, who was 43 at the time, was hired in spite of his people problems. As plaintiff points out in his brief, however, Roth was hired as a supervisor because he was the union president. In a supervisory capacity, Roth could not act on behalf of the union, and the company would have an easier time

achieving decertification. This is consistent with Gold Bond's new 90-day strategy, rather than constituting evidence of age discrimination. 5

July 19, 1983

Mr. Jose' D. Rodriguez
Equal Opportunity Specialist
Equal Employment Opportunity
Commission
536 South Clark Street, Room 234
Chicago, IL 60085

Re: Grohs v. Gold Bond Building
Products,
EEOC Charge No. 051 83 3359

Dear Mr. Rodriguez:

This letter is in response to the above-referenced charge and your questionnaire regarding the charge. I am confident that your investigation will lead you to conclude the Mr. Grohs' discharge was in no way based on his age, and that the Respondent has not discriminated against him in any unlawful manner.

The Waukegan plant of Gold Bond Building Products manufactures gypsum

wallboard and related products for use in the building industry. The depressed economic conditions in the building industry in the early 1980's were especially felt by the Waukegan plant, and in October 1981, required the company to make substantial cutbacks in production schedules and personnel levels at its Waukegan plant. Accordingly, the following supervisors were laid off in October 1981:

1. Walter Daniels (Age 38)
2. George Ester (Age 38)
3. Jessie Jones (Age 48)
4. Larry Manuel (Age 59)
5. Orlin Ree (Age 44)
6. Keith Totsch (Age 44)

These layoffs were made on the basis of job performance and versatility, and were made without regard to the age or seniority of the individuals

involved.

Despite these cutbacks, the Waukegan plant was unable to maintain a profitable position. Accordingly, in January 1982, the company decided to indefinately curtail production at its Waukegan operation. All hourly personnel were laid off at this time, while the supervisory staff served as custodians of a shut-down facility.

During the spring of 1983, the company decided to restart the Waukegan operation. Before doing so, however, it analyzed the factors responsible for the plant's nonprofitability prior to the closing. It concluded that poor personnel practices and labor relations policies were largely responsible for the gradual deterioration of the plant. It therefore decided that a new attitude and approach in personnel matters and employee relations would be necessary if the plant were to be run in a profitalble manner. Mike Ward was then assigned as the new plant manager to undertake this challange.

Mike carefully reviewed the performance apprailsals and anecdotal information regarding all his supervisors as he prepared for the start-up. He was especially

concerned that Mr. Grohs' 1981 and 1982 performance appraisals indicated deficiencies in labor relations and personnel matters -- areas that would be critical to the success of the new operation. He then investigated Mr. Grohs' work record and learned of the following:

1. During the 1981 labor

negotiations with the United Cement, Lime, Gypsum and Allied Workers International Union, Local 409, the bargaining committee consistently complained about Mr. Grohs' inability to deal with people.

2. On several occasions, Mr. Grohs sought to undermine his peers by

spreading false rumors regarding stealing by another supervisor, as well as heterosexual and homosexual relationships of supervisory employees.

3. Two complaints were made regarding sexual harassment by Mr. Grohs, including verbal and physical harassment, and the creation of a sexually intimidating atmosphere at staff metings.

4. Mr. Grohs indicated to the previous plant manager that he would "step on" anyone who tried to get in his career path, a statement hardly indicative of a good relationship with peers.

Based on these demonstrated inadequacies in the key area of personnel relations, Mike Ward determined that Mr. Grohs could not be an effective member of the new

Waukegan team. He therefore terminatd Mr. Grohs on April 29, 1983, and replaced him with Jon Roth (age 43).

Despite Mr. Grohs' inadequacies the company wanted to make Mr. Grohs' separation from the company as amicable as possible. At Mr. Grohs' termination meeting, the company indicated it would be willing to treat the separation as a resignation rather than termination, and would offer help in the areas of:

1) severance pay
2) Job placement
3) health insurance benefits

Needless to say, Mr. Grohs would also receive his vested pension benefits in accordance with the company's pension plan for salaried employees.

While the company has not discriminated against Mr. Grohs in any unlawful manner, it remains willing to offer assistance in the above areas in

recognition of Mr. Grohs' long service to the company. I am confident that the efforts of Mr. Grohs and the company will enable Mr. Grohs to obtain other employment with no real financial loss. Thus far, Mr. Grohs has declined this assistance from the company.

Please let me know if I can provide you with further information to assist in your investigation of this matter.

Very truly yours,

Gold Bond Building Products
Division of National Gypsum Co.
Thomas J. Lynch
Labor Relations Attorney

December 7, 1983

Mr. Jose D. Rodriquez
Equal Opportunity Specialist
Equal Employment Opportunity
Commission
536 South Clark Street
Chicago, IL 60685

RE: Grohs v. Gold Bond Building Products, EEOC Charge No. 051 83 3359

Dear Mr. Rodriguez:

This letter is in response to your request for additional information in your investigation of the above-referenced charge. I have reviewed the information you requested, and hope this letter will assist you in concluding your investigation.

I am sure your analysis of the facts will demonstrate to your satisfaction that the performance appraisals of the supervisors who were laid off in Oct-

ober, 1981 has no relevance in showing whether Mr. Grohs was discriminated against because of his age. Since Mr. Grohs was retained after the 1981 layoff, the reasons other individuals were laid off can have no bearing on why Mr. Grohs was subsequently terminated. The information certainly cannot support a statistical showing of age discrimination in the other employment decisions since the statistical analysis of the 1981 layoff does not make a prima facie showing of age discrimination. Little purpose would therefore be served by considering the myriad reasons why certain individuals were laid off in 1981.

During the 1981 labor negotiations, Jon Roth, president of the local union and spokesperson of the Waukegan employees, complained

on several occasions about Mr. Grohs' inability to deal with people in an understanding manner. Present at these negotiations were Thomas Brooks, Thomas Lynch, Rebecca Parkman, Wallace Behrens, Thomas Tomasiewicz, Diana Cuna and Charles Huntbach.

On Monday, February 8, 1982, Office Manager Mary Ann Seigel spoke with Plant Manager Thomas Brooks about several rumors Mr. Grohs had been circulating about his peers. Mr. Grohs had alleged there were sexual relationships between Rebecca Parkman and Donna Bittner, between Rebecca Parkman and Thomas Brooks, and between Rebecca Parkman and Thomas Lynch. Mr. Grohs had also stated that Robert Cudsworth had been accepting bribes as maintenance superintendent. Mr. Grohs had previously told Production

Superintendent Robert Coventry that there was also a sexual relationship between Thomas Brooks and Jessica Elrod. Since this matter may well end up in litigation, I would rather not provide you with affidavits at this time regarding these occurrences.

On several occasions, Thomas Brooks reprimanded Mr. Grohs for sexually harassing salaried female employees. During the summer of 1981, Mr. Grohs asked Darlene Ramig, a married female employee, to adjourn to a local motel with him after a supervisors' dinner. At another supervisors' dinner, Mr. Grohs attacked Rebecca Parkman by pulling her to his lap and grabbing her between the legs. In June of 1981, during a business trip to Kalamazoo, Michigan with Thomas Brooks and Rebecca Parkman, Mr. Grohs attempted to harass Ms. Parkman in a sexually offensive manner by telling a

male patron at a hotel bar to go to Ms. Parkman's room for sexual favors. Finally, in the presence of Ms. Parkman and Ms. Seigel at salaried staff meetings, and in the presence of females in the office area. Mr. Grohs would create a sexually offensive atmosphere by fondling his genitals in a lewd and public manner. No written complaints were filed protesting these instances of sexual harassment.

Jon Roth was an hourly employee until the start-up of of the Waukegan plant in 1983. Since no performance appraisals are completed for hourly employees, there are no written appraisals of Mr. Roth's performance.

The company did not immediately fill the position of board plant superintendent that was held by Mr. Grohs. Immediately after Mr. Grohs' termination, the job duties were performed by Plant Manager

Michael Ward, who is 48 years old. On September 1, 1983,

December 7, 1983

Herman Fraley, age 34, was appointed board plant superintendent.

I hope this information will be helpful in your investigation. If you need any additional relevant information, please let me know.

Very truly yours,

Gold Bond Building Products
Division of National Gypsum Company
Thomas J. Lynch
Labor Relations Attorney

National Gypsum Company

Performance Appraisal Report

Name: Dennis H. Grohs

Position: Dept Supt B - (Mill)

Division: G.B.B.P.

Anniversary Review Date: 10-01-79

Reports to Prod. Supt.

Immediate Superior's appraisal of incumbent's overall performance against established objectives:

Check one:

Distinguished

Outstanding performance clearly obvious to all.

Commendable

Performance noticeably better than "Acceptable."

Acceptable X

Performance expected of a fully competent, seasoned employee.

Fair

Performance where need for further

development is recognizable.

Marginal

Provisional for inexperienced newcomers and others whose performance is below acceptable levels.

Comments:

SAFETY - Two lost time accidents in Mill in 1978-None to date in 1979,-very safety conscious superintendent.

QUALITY - Dennis is very alert to quality problems, both in - process and finished product. Quality complaints on plaster in 1978-11.

LABOR RELATIONS - Very professional in his approach to personnel. No greivances in 1978- No 1979. Very strong in this area.

HOUSEKEEPING - Better than average.

productivity and costs;

PRODUCTIVITY AND COSTS; Costs in

Performance Appraisal 10/16/79

Dennis area of responsibility are well below standard. Stucco costs for 78'-$.422 US. sTD of 585. 79'-$.528 US standard of .493 these 79' costs reflect very severe operating conditions in early 79' due to weather.

GENERAL - Dennis handles the management of his department with very little direction. Very aggressive, sets goals and strives to meet them. Dennis is ready for a greater chalenge

I have read and understand the above, Dennis Grohs 10-1679

B.B. Bowers 10-16-79

Note: "comments" are required on all performance appraisal reports. Appraisals of "Distinguished" or "Commendable" must be substantiated in detail.

Comments of appraiser's Superior:

-A33c_

Performance Appraisal 10/16/79

Dennis Dennis has been a consistent and strong mill supt. and is capable of handling, a broader area of responsibility

Robert Coventry

Officer's Signature Beck 10/31/79

NATIONAL GYPSUM COMPANY

PERFORMANCE APPRAISAL REPORT

Name: Dennis H. Grohs

Position: Dept. Supt;. C - Waukegan

Supervision: G.B.B.P.

Anniversary Review Date:

October 1979

Reports to: Prod Supt.

Immediate Superior's appraisal of incumbent's overall performance against established objectives:

Check One:

Distinguished

Outstanding performance clearly obvious to all.

Commendble

Performance noticeable better then "Acceptable,"

Acceptable X

Performance expected of a full competent, seasoned employee.

Fair

Performance Appraisal 8/1/79

Performance where need for further development is recognizable.

Marginal

Provisional for inexperienced newcomers and others whose performance is below acceptable levels.

Comments: See attached

Robt. Coventry 8/1/79

Note: "Comments" are required on all performance Appraisal Reports. Appraislas "Distinguished" or "Commendable" must be substantiated in detail.

Comments of Appraiser's Superior: Dennis is in my opinion, the backbone of supervisory force at Waukegan. The only stabilizing member of the group. I rate him very highly 8/25/79

Officer's Signature-Byron B. Bowers

Performance Appraisal 8/1/79

SAFETY - There were two lost time accidents in the mill in 1978. To date in 1979 there has been one medical case but no lost time injuries.

QUALITY - Dennis is very alert to variations in quality of both in process and finished products. Quality complaints for 1978 totalled eleven; complaints to date in 1979 total three.

LABOR RELATIONS - His direction of personnel is both professional and concerned resulting in an organization that will give extra effort as needed. There were no grievances in 1978 or to date in 1979.

HOUSEKEEPING - In most areas housekeeping is better than average with only a few chronically poor spots.

Performance Appraisal 8/1/79

PRODUCTIVITY AND COSTS - Direct labor costs for land plaster and stucco for 1978 were $.388 and $.422 vs. standard costs of $.585 and $.557. Through June of 1979 these actual costs were $.$.484 and $.528 vs. standard costs of $.412 and $.493. The 1979 to date actual costs reflect severe operating conditions occurring early in the year which are being offset by recent months' costs being well below standard.

GENERAL - Dennis handles the full scope of management of his department very well and is less depencent on outside assistance than average. He is quite aggressive in reaching his goals and is willing to contribute his knowledge or experiences in other areas of the plant.

I have read and understand the above

Dennis Grohs

Date 8-1-79

NATIONAL GYPSUM COMPANY

PERFORMANCE APPRAISAL REPORT

Name: Dennis H. Grohs

Position: Department Superintendent B

Location: Waukegan

Anniversary Review Date: October 1980

Reports To: R. A. Coventry

Overall Evaluation

Marginal - Adequate - Competent X

Outstanding - Distinguished

ACCOUNTABLIITY EVALUATION

Identify major job accountabilities (list in order of importance)

1. Maintain cost and wage levels per action plan

2. Provide training per action plan.

3. Insure board quality within specifications

4. Improve mechanical condition of Board plant per action plan.

Measurement of performance: Indicate

Performance Appraisal October 81'

results against accountabilities and objectives, using measures which support employee's performance of each entry (include significant accomplishments. constructive comments on major weak areas). Be specific.

1. Material usage controlled to standard. Labor cost unfavorable due to low efficiency caused by equipment
2. Action plan goals achieved
3. Major general improvements in board quality during year with action taken specific variances from specs.
4. Action plan on schedule plus additional major improvements made beyond scope of plan.

Performance Appraisal Aug. 80'

5. Reduce lost time injuries by one - third

6. Maintain housekeeping at division standards

7. Improve inventory control

5. No lost time injuries in 1980 compared to 12 lost time in 1979

6. Improved over past year variable at time so consistency is needed.

7. Changed procedures and reorganized assignments. Has reduced variance of physical to books by 50%.

R.A. Coventry (Appraiser's Signature)

Prod. Supt. (Title)

8/6/80 (Date)

Note: Comments are required on all Performance Appraisal Reports. Appraisals of Distinguished or Outstanding must be substantiated in detail.

Comments of Appraiser's Superior:

Dennis has worked very hard to

improve board plant performance. He is weak in labor relations but is working to improve in this area. Dennis rating is competent but is very close to Outstanding

Byron B. Bowers

(Signed)

Plant. Mgr. (Title)

8/8/80 (Date)

Concluding remarks: Comment on corrective action or areas for development, if applicable.

(No comment)

This analysis has been discussed with me. Employee's signature

Dennis Grohs

Date 8/6/80

Employee Comments: (no Comments)

NATIONAL GYPSUM COMPANY

PERFORMANCE APPRAISAL REPORT

Name: Dennis Grohs

Position: Board Plant Super. (B).

Location: Waukegan Plant

Anniversary Review Date: Oct. 1981

Reports To: Robert A. Coventry

Overall Evaluation

Marginal - Adequate - CompetentXX

Outstanding - Distinguished

ACCOUNTABILITY EVALUATION

Identify major job accountabilities

(List in Order of importance)

1. Maintain costs at Standard.

2. Improve mechanical condition of Department.

3. Maintain product quality at acceptable levels.

4. Maintain safety at Division Standard.

Measurement of performance: Indicate results against accountabilities and

objectives, using measures which support employee's performance of each entry (include significant accomplishments. constructive comments on major weak areas). Be specific.

1. Costs through July 1981 indicate all major board produced for less than standard cost.
2. Machine efficiency 1981 to date is 94.3% vs. 90.4% in 1980
3. Quality settlements 1981 to date are $2043 below budget. Sales has expressed satisfaction in March.
4. No lost time accidents, 0 medical injuries.

Performance Apprasail Aug. 81'

5. Improve housekeeping to meet higher standards.

6. Maintain personnel training at all levels.

7. Improve inventory control to higher standard.

5. Painting improved general cleanliness improved but not yet at consistently high level desired.

6. Training progressing at level established by action plan.

7. Successfull reduced raw material in line with objective. Improved system to improve finished board count.

R. Coventry (Appraiser's Signature)

Prod. Supt. (Title)

Aug. 11, 1981 ~~(Date)~~

Note: Comments are required on all Performance Appraisal Reports Appraisals of Distinguished or Outstanding must be substantiated in

detail.

Comments of Appraiser's Superior:

Overall rating is a strong competent. Has done a very good job manufacturing a quality product. Sales districts are very pleased with quality. Needs to improve on maintaining a consistant housekeeping program. Objective is 90 or better. Has improved in labor relations but still needs to work on developing a little more finesse.

Thomas C. Brooks (Signed)

Acting Plant Manager (Title)

8/13/81

Concluding remarks: Comment on corrective action or areas for development, if applicable.

Needs to establish uniform departmental procedures and labor relations actions.

This analysis has been discussed with

me.

Employee's signature:

Dennis Grohs

Date 8-11-81

Employee Comments: The appraisal is fair and just, next year outstanding.

Bavis Notes

Sarvis 4-14

3. High level guys reporting to Mike. Supt. - Foreman. 1 Office Manager (Spitz disagrees but Sarvis will fight)

8. Next level down, category called "technician, something to report to the 3 super. - foreman. Lead man, but working. Head honcho. Discuss this w/ Mike so that he'll understand. Look especially at Dennis Grohs, concerns re: his people abilities. Give Bob my opinion. The other 2 look pretty good. Murray may be salvagable, maybe not at Waukegan

88-1460

No.

Supreme Court, U.S.
FILED
JAN 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

DENNIS GROHS,

Petitioner,

vs.

GOLD BOND BUILDING PRODUCTS, a division of NATIONAL GYPSUM COMPANY,

Respondent.

APPENDAGE OF

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Kathleen B. Baliunas
[Counsel of Record]
One North LaSalle Street
Chicago, Illinois 60602
Ph: (312) 782-5906
Attorney for Petitioner

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Sarvis - direct

ROBERT H. SARVIS,

DIRECT EXAMINATION

[10] BY MS. BALIUNAS:

Q. Mr. Sarvis, could you please state your full name for the record.

BY THE WITNESS;

A. Robert Hammond Sarvis

Q. What is your address?

A. 11 South Water Street, Nantucket, Massachusetts.

Q. And how old are you?

A. Forty-two.

Q. Are you married?

A. Yes.

Q. Are you currently employed?

A. Yes.

Q. What is your position?

A. I'm president and treasurer.

Q. Of what company??

A. Brant Point Corporation.

[11]Q. What type of business is that?

A. It is a construction and development corporation.

Q. What is it involved with, what kind of construction?

A. It builds residential and commercial buildings.

Q. Do you use Gold Bond products --

A. Yes.

Q. -- in your company?

THE COURT; Is this construction development on Nantucket?

THE WITNESS; Yes.

BY MS. BALIUNAS;

Q. Can you please tell me what the highest level of education you have achieved is and when you received it?

A. I have a Master's in business administration from Case Western

Reserve, and I received that, I believe, in 1971 or '72.

Q. Who was your previous employer before Brant Point then?

A. National Gypsum Corporation.

Q. Can you give me the dates of your employment with Gypsum?

A. I believe it was August or September of 1978 through November of 1983.

Q. What was your first job with the company?

A. Managing director.

Q. What did you do in that job?

A. Initially, I was in charge of the Manchester vinyl siding operation.

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[12]Q. Did your job duties change?

A. Yes.

Q. How did they change?

A. I received additional plant responsibilities over the period of my employment.

Q. Can you tell me which plants you received?

A. I received the Halifax, Nova Scotia operation in Canada. I had the Portsmouth plant in New Hampshire, the Rensselaer plant in New York, the Niles plant in Ohio, the Mobile plant in Alabama, the Matteson plant in Chicago, and the Waukegan plant. I think that's eight.

Q. Can you tell me when you took over the Waukegan plant?

A. It was, I believe, March of '83

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Q. What was the status of the Waukegan plant at the time?

A. It was shut down.

Q. What were your responsibilities with regard to the Waukegan plant?

A. My responsibilities were to start the plant up, attempt to decertify the union, and to manage the operation once it was started up.

Q. What did you do to get the plant started up?

A. Initially, we had to select a plant manager for that plant, and there were a number of techinical things that we had to do. We had to employ, hire people for the plant, correct, and get the equipment in order to start the plant up, a number of things like

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[14]Q. Despite some problems that he had with employees in the past?

MR. LIEBERMAN; Objection; leading.

BY MS. BALIUNAS;

Q. Did you have a discussion with respect to your reservations about Mr. Ward with Mr. Spitz?

A. Yes, I did.

Q. What did you say?

A. I told him that my one reservation with Bob Spitz, in regard to the decertification campaign that we were going to carry on, was that he had had employee-relations problems, and he had -- his record showed that he had a very strong temper, and that could cause us a problem. Spitz and I discussed that, and we decided that we would have to

control that, and, hopefully, Ward through that, that the other assets were more important to us at the time.

Q. Now, you mentioned that you wanted to decertify the union. What action did you take in order to get the union dedcertfied?

A. Well, it was -- there were several steps. The first step was to select employees that we had screened, that we knew had antiunion or were at least leaning towards a nonunion type of operation. That was step one.

We brought up some personnel people, I think, Charlie Goyd and maybe on of his assistants, to screen these employees to determine whether they would fit our criteria for employees. That was the first step.

[15]And then there was an ongoing campaign to convince them that they didn't need a union at the Waukegan plant, that they would be treated fairly, and management would be concerned about their problems. And so it was a promotional kind of thing.

Q. What about with respect to Mike Ward, did you give him any input as to decertification?

A. Well, yes, and we sent him to a school for, I think he was there a week, that specialized in training managers and supervisors how to deal with unions and how to go about decertifying a union, what kind of employment policies you should carry out.

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Q. When did you send him to the school?

A. As I remember it, it was late March or early April 1983.

Q. And where was Mr. Ward stationed at the time?

A. He moved to Waukegan sometime in early April. Before that he was in Phoenix.

Q. Where was the school located?

A. I believe it was in Dallas.

Q. How did you find out about this school, Mr. Sarvis?

A. I had attended the school approximately a year, maybe a year and a half before that. In terms of generally working with employees and labor unions, the company had worked with these consultants on many occasions prior to, and so the company recommeded that.

Q. What kind of supervisors were the

[16]

respect to the start-up of the plant?
A. We were looking for supervisors who had actual board line experience, who knew how to operate the facility. We were also looking for, I would say, young supervisors who could grow with that operation if we were able to put it on line and keep it operational.

MR. LIEBERMAN: Objection; no foundation as to what they were looking for.

THE COURT; At this point, I understand as what was going through this witness's mind If counsel wants to take it further than that, that's

BY MS. BALIUNAS:

Q. What were Mike Ward's responsibilities as the plant manager of the Waukegan plant?

A. He was responsible for hiring and training the new employees, hiring supervisors, overseeing the start-up, recommending any improvements to equipment that might be necessary, and implementing that start-up, and then managing the plant and trying to achieve our objectives for plant efficiency.

Q. Did he have a specific time frame to do this in?

A. We were on a tight timetable. I think that we promulgated the fact that we wanted to have this plant up and operational in 90 days. I think

as a realistic matter, we as managers knew it would take longer than that, but there was an importance from our standpoint to both convince the employees that it was a short

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[17term, so that they would vote for decertification, and, second, we did have to get the plant up. So there was a time frame. I would say, that we wanted the operation to be up in operation within six to seven months after we had started with Mike Ward.

Q. What was so important about decertification? Why was it so important?

A. Well, I think there were several aspects of that. One was just the fact that it was important for the company to decertify a union in one of its plants, and this plant gave us the most opportunity because there were really no employees there. There was a union, but no employees.

Second, the company had related problems in the plant to the previous

union situation and felt that the union had been overly restrictive in operating the plant.

Q. Prior to the discharge of Dennis Grohs, did you ever discuss his termination with anyone from management?

A. Could you repeat that?

Q. Prior to Dennis Grohs' discharge, did you ever discuss his termination with anyone from management at Gold Bond?

A. Yes.

Q. When was the first discussion that you can recall?

A. The first discussion I recall was with Bob Spitz and, I believe, Mike Ward in what would have been late March early April, when Spitz told myself and Ward that he wanted Grohs terminated.

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[18]Q. Was that the central issue of the discussion, or were there other matters discussed at the same time?

A. Well,at that time Bob Spitz and I had made a tour through the plant, so we discussed a number of things relevant to the plant both of a technical nature and of employees. He indicated to me that not only did he want Grohs terminated but he also wanted Qualls terminated at that time. He complained to Qualls and myself and, I believe, Mike Ward, but I can't remember for certain, about the condition of the plant, that the silo area was very messy, and that he wasn't happy about that.

Q. Was Dennis Grohs blamed at all for the condition of the plant by Mr. Spitz?

A. I don't recall that.

Q. Was there any other conversation other than this one, any subsequent conversation regarding the termination of Dennis Grohs?

A. Yes, there was a conversation in late April, I think it was the 28th of April, '83.

Q. Who was present for that conversation?

A. Initially, Bob Spitz and myself, and then myself and Bob Spitz and Jim Bavis.

Q. Where was the conversation held?

A. The conversation occurred in Bob Spitz's office in Charlotte, North Carolina.

Q. Can you tell me how is it that you -- why did you attend that meeting?

[19]A. I was requested to attend that meeting by Bob Spitz.

Q. Were you in Charlotte at the time?

A. I was asked by Bob Spitz to fly from where I was vacationing in Florida to attend the directors' meeting, and to meet with him concerning Waukegan and the discharge of Dennis Grohs.

Q. Okay. To the best of your recollection, could you please tell the Court what was said by each person at that meeting?

A. Initially, Bob Spitz and I met to talk concerning Dennis Grohs. He told me that he wanted Dennis Grohs fired, that it was taking too long to get rid of him, that he was too old and too fat for the job, and he

wanted him terminated. And during that time, he showed me a list of employees that he had that he wanted to terminate. I think it was after that that he got Jim Bavis to come down and meet with us and give us a scenario under which conditions we could effectively fire Grohs.

Q. Would you please tell the Court who Jim Bavis is?

A. Jim Bavis was then in charge of, I think it was human resources, which was the employee aspect of the division in Charlotte.

Q. Was he an attorney?

A. He was an attorney.

Q. I'm sorry; go ahead.

A. Bavis gave us two scenarios. One was to discharge Grohs and replace him with an older man, even if it was temporary. Spitz

[20rejected that approach. Then Bavis suggested that we just eliminate the job. That approach was accepted.

We called Mike Ward and directed him to discharge Grohs the next day. This was done. Bob Spitz had a speaker phone in his office, and we did it. All three were on the phone. Bavis recommended that Lynch attend that discharge with Grohs. I don't know whether Lynch was there at the plant, but I know that he was on his way if he wasn't there at the plant at the time.

Q. Was Dennis Grohs' job performance discussed at all by Mr. Spitz at the time?

A. No.

Q. Did Mr. Spitz indicate why he wanted this advice from Mr. Bavis?

A. He was concerned about the legalities of firing and possible

Sarvis - cross

Q. At the time you hired Ward, you told him that one of his objectives was to establish better employee/employer relationships to make the plant the right kind of place for a decertification election?

A. I don't know exactly the time of hiring but, certainly, shortly thereafter.

Q. Your sending Ward to the decertification clinic or seminar in Dallas was part of your plan to train him, give the tools to do this?

A. Yes.

Q. As I understand it, you attended this seminar as well at one point?

A. I attended a different, similar seminar but similar in nature.

Q. Okay. You understood that one of the subjects at the seminar would deal with establishing a better relationship between management and the employees at a planat in order to foster decertification?

A. Yes.

Q. The idea being that management convinces the employees that

[45] they are better off without a union?

A. Yes.

Q. The theme that was sold in those seminars and in these campaigns is trust. Trust us, you can trust us rather than the union?

A. Yes.

Q. So the focus of these decertification efforts is one of unity or harmony between the company and the employeees?

A. Yes.

Q. If the employees don't trust management or the supervisors they are not going to vote the union out at least that's the general theory behind --

A. That's right.

Q. -- one's approach to these things?

Now, am I correct that you submitted two affidavits earlier in this case?

A. That's correct.

Q. You signed two affidavits.

Just for identification purposes, at this point, I'll show you what is marked as Defendant's Exhibits 13 and 14.

Now, directing your attention first to Defendant's Exhibit 13, am I correct that this was prepared by your attorneys and Ms. Baliunas, the plaintiff's lawyer?

A. I Think just my attorneys.

Q. Miss Baliunas telephoned you and interviewed you over the

[48] A. No, but my attorney dictated the affidavit.

Q. This was true, was it not? You meant for it to be a true affidavit, I assume?

A. Yes.

Q. Is it also true that you had no involvement, you had virtually, no involvement with Grohs' termination?

A. That's correct.

Q. So the second affidavit related to whether you had any involvement in the termination, isn't that true?

A. I don't see how that modifies virtually no involvement, the second affidavit.

Q. The second affidavit, as I read it, says, "Although I had virtually no involvement in the Grohs termination, I was with Spitz at the

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Waukegan Plant in or around April '83, when we met with Michael Ward"

So the purpose of that second affidavit was to talk about your involvement in the Grohs termination, was it not?

A. Yes, but it wasn't the purpose to modify the fact that I had virtually no involvement?

Q. Right. The first affidavit said you had virtually no involvement in the Grohs termination, "as I had just received responsibility for the Waukegan plant and was not familiar with the operations there," right?

A. That's correct?

Q. In fact, there is no indication that you were involved in the

Grohs termination in the first affidavit, is there?

A. I said, I was virtually not involved.

Q. In the first affidavit, there is no reference to any involvement that you had in the Grohs termination?

A. I guess I would ask you for a definition of "involvement." What do you mean by "involvement"?

Q. Well, you're the one who said it. Paragraph 5: "I had virtually no involvement in the Grohs termination as I just received" --

A. Well, then maybe I should define what "involvement" means to me in termination. It certainly means more than standing there and listening to somebody tell you to fire somebody. It means making an

evaluation of the individual, looking at his record, setting objectives for an individual, seeing that he couldn't meet those objectives, and terminate him. That's involvement.

Q. Okay. Well, just to clarify this, so the second affidavit was for purposes of answering the question put to you, "Mr. Sarvis, did you have any involvement between Spitz, Ward and you in the Grohs discharge?"

[77]Q. What was Jon Roth doing? You claim that you replaced -- wasn't Dennis at one time the board plant superintendent? --

A. Yes, he was.

Q. Well, you say you replaced with Jon Roth. If Dennis was the board superintendent, I don't understand why you say you replaced him with Jon Roth.

A. Dennis' job title was board plant superintendent. Prior to the start-up, he was essentially a custodian of the shutdown operation, almost a security guard.

The new operating plant, once the plant was started up, was what the company called a lean-and-mean

operation that was very minimally staffed and did not have a board plant superintendent.

Q. But they had someone performing those duties?

A. Of the board plant superintendent?

Q. Yes. Because you have to have -- as a matter of fact, isn't it true that Waukegan is the only plant that did not have a board plant superintendent of all the plants?

A. No.

Q. Even the start-up in Medicine Lodge had a board plant superintendent, didn't it?

A. I would imagine they did. Medicine Lodge is one of the biggest plants that the company had. The Waukegan plant, at the start-up there, was the smallest operation that the company had.

Q. So are you saying that Dennis Grohs then was not the board plant superintendent when he was replaced by Jon Roth?

A. His job title was board plant superintendent. He was not performing the duties of board plant superintendent, no.

Q. Going back to your statement on December 7th. You say: board plant superintendent that was held by Mr. Grohs. Immediately after that, Mr. Grohs' termination, the job duties

were performed by plant manager Michael Ward, who is 48 years old."

So, was Dennis Grohs, or was he not, board plant superintendent? I still can't figure that out from your testimony.

BY THE WITNESS:

A. His job title on official payroll records was board superintendent. He was not performing the duties of the board plant superintendent, however.

BY MS. BALIUNAS:

Q. Turning to your second position statement, after stating in your first position statement that "During 1981 labor

[80]committee as often as Mr. Grohs' name came up in those negotiations.

Q. Those took place in December of 1981?

A. November '81.

Q. Why wasn't Dennis terminated in February?

A. That wasn't my decision to make.

Q. Did you recommend that he be terminated?

A. No, I didn't.

Q. Now, you remember back in 1985 when I noticed up a rule 30 (b) (6) deposition of the company to answer my questions about Dennis' termination, and you were the one selected to answer those question, is that right, Tom?

A. That's the January 10 deposition?

Q. Yes.

A. Right.

Q. Now, according to your testimony, it is Gold Bond's claim that the only reason that Dennis Grohs was discharged was his inability to get along with people, is that correct?

A. That's my understanding, yes.

Q. How long did Dennis work for Gold Bond, do you know?

A. I don't know.

Q. Okay.

A. I know it was a long time.

Q. During the time that Dennis worked for Gold Bond, he was a company man, that is, he was always a loyal employee to Gold

[81]Bond, wasn't he?

A. His loyalty was never questioned.

Q. You approved of the decision to discharge Dennis, didn't you?

A. Yes.

Q. As a matter of fact, you actually participated in that discharge.

A. I don't know what you mean by "participated in the discharge"?

Q. Were you present for the discharge?

A. Yes.

Q. Did you say anything to Dennis during the discharge?

A. Yes.

Q. Did you ask him to resign rather than be discharged?

A. I didn't ask him to do that, no. I told him that if he wanted to resign, that the company would offer assistance in the way of

out-placement services, extended severance pay, extended health benefits, things like that.

Q. Who is Robert Spitz?

A. He's Gold Bond's vice president of manufacturing operations.

Q. In early 1983, did Robert Spitz decide to start up the Waukegan plant?

A. It was a decision of Gold Bond Building Products that the executive committee made of which Mr. Spitz is a part.

Q. Is it the company's claim that Mr. Spitz concluded that poor labor relations were responsible for the deterioration of the

A. I'm saying that it was made by a committee of which Spitz was a member.

Q. Was it true that supervisor had to be selected with an eye toward their personnel skills?

A. Yes.

Q. Mike Ward was selected to carry out this policy, is that correct?

A. To hire supervisors, correct.

Q. To carry out the policy, the sharing-and caring-policy, isn't that right?

A. He was one of several people. Mr. Sarvis was responsible for it. I was somewhat responsible for it.

Q. Bob Spitz chose Mike Ward to run the re-opened Waukegan plant, basically, didn't he?

A. That's my understanding.

Q. Mike Ward should have been the first one to carry out the company's family team concept, is that right?

A. I don't know if anyone was supposed to come before somebody else, but he was certainly one of the people, sure.

Q. That would be especially true during these crucial 90 days that the plant had to prove itself to stay open, isn't that right?

A. Yeah. Otherwise there would be no operation at all.

Q. This family team concept means that both management and hourly employees were a team sharing in the work, caring about

[88]each other, and caring about the product that the team produced, is that right?

A. That's certainly an acceptable definition.

Q. With respect to the supervisors, they wanted them to understand the people and to deal with them in a compassionate manner, is that right?

A. Correct.

Q. They wanted communications to be better between the employee and the supervisor, is that right?

A. Correct.

Q. But Mike Ward had a communications problem himself at the time that he was selected, didn't he?

A. I don't know what you mean by "communications problems." I don't know anyone who can communicate with

Q. Who, Les Scoggin?

A. Les Scoggin.

Q. He was mainly maintenance, isn't that right?

A. I believe so.

Q. Who was retained other than Les Scoggin?

A. Dennis Grohs, Jerry Orrick, Dave Burks, and Murray Qualls.

Q. Do you know how old, at that time, Jerry Orrick was?

A. No.

Q. Any of them?

A. I know that Dennis was over 40. Murray Qualls was over 40. And Orrick and Burks were under 40.

Q. But you knew their ages two years later when the plant started up, is that correct; that Dave Burks was

about 33, Dennis was 51, Jerry was 31, and Murray was 43?

A. These ages were correct on July 1983, to the best of my knowledge, yes?

Q. Actually, Murray ws 41, isn't that true, not 43?

A. I believe that it was true. If it wasn't, it wasn't but that was my understanding at the time.

Q. Did seniority play a part with respect to the second layoff?

A. Which?

Q. The shutdown. The people who were retained, did seniority play a part?

A. I believe those were the same four individuals who worked on the one-shift operation between October and February. I'm not, I

[97]operation to a one-shift operation.

In fact, it was only going to produce four days a week.

Because the supervisory staff was being curtailed to the bone, the people that were -- that would be kept on had to have versatility in more than one area. Dennis apparently had skills in more than one department, more than one area of the plant.

In adddition to that, the evaluations, previous evaluations on the performance appraisals, the marginal, adequate, competent, outstanding, distinguished were looked at for those people. And based on those two factors, a decision was made to keep Dennis.

Q. So he was pretty knowledgeable about the operations of the plant;

that's why he was kept, is that right?

A. He knew more than one area as I recall, yeah.

Q Tom Brooks went other to Pheonix, is that right?

A. Correct.

Q. Bob Coventry, who was Dennis' direct supervisor, went to Rotan, Texas?

A. Correct

Q. During those 1981 labor negotiations, they were held in, did you say November, December, something like that?

A. November.

Q. November. Did you back Dennis Grohs when these comments were made by the union committee? Did you back him up?

A. No. In fact, in caucuses with the company, I had told Tom

110]Q. Turn to page 120, line 21:

"Question: Don't you think that if the company had told him, 'Look, Dennis, we have got this new way that we are going to be handling these things from now on, don't you think that Dennis, being a company man, would have attempted to go along with company's program?

"Answer: Would he have attempted to? Maybe. Would he have been successful? I don't think so."

A. That was my testimony?

Q. Yes.

A. He was, prior -- between the time Mike Ward got to the plant and the time Mr. Grohs was terminated, I know that Jim Bavis visited the plant and talked to all the supervisors, including Mr. Grohs, about the new

plan for the Waukegan plant and the need for more understanding relationships between supervisors and the employees. And Dennis, certainly, at least at that time, I know was told about the new plan.

Q. But when I asked you back two years ago, you gave me that answer, is that correct?

A. Yeah, and that answer is still correct. I'm not changing that answer at all.

Q. Did Mike Ward say anything to Dennis about improving his labor relations?

A. You'd have to ask Mike; I don't know.

Q. Now, as of July 1982, Murray Quals was an outstanding

[115]weren't located. I know of cases when performance appraisals are never done, particularly when employees are moving from facility to facility. That could be well be the case here.

Q. So your saying that maybe they weren't done?

A. That could be the case.

Again, it's entirely different with expense reports.

Q. I'd like to show you what has been previously marked as Plaintiff's Exhibit No. 49 and admitted into evidence pursuant to stipulation of the parties. Can you identify this document, please?

A. It's titled "Defendant's Response to Plaintiff's Second Interrogatories" in this action.

Q. Did you draft this document?

A. No.

Q. Did you sign this document?

A. Yes.

Q. Did you put the information together for this document?

A. I believe most of it was put together by Rick Lieberman. Parts of it, I'm sure I got him some of it. The specifics as to who got what from who, I really can't tell you.

Q. But you certified it as being true, isn't that true?

A. "I certify that upon information and belief that these responses are true and correct."

Q. Now, looking at this document, you state -- this document list people who have substantial knowledge of the case, is that

[116]A. It says, "This is a list of persons that defendant believes possess substantial knowledge of the relevant facts."

Q. I asked for the name, address, phone number, place of employment. You stated on the second page that in the case of corporate agents, "Defendant objects to providing addresses, telephone numbers, and places of employment. in those instances we have instituted National Gypsum instead of address, telephone number, and place of employment."

Is that correct?

A. Correct.

Q. Now, if you take a look at number 10, the name Robert Sarvis appears and National Gypsum Company underneath his name.

A. Correct.

Q. His address was not provided to me, was it?

A. No.

Q. Instead, you said he was a corportate agent, is that correct?

A. The document says that addresses are not provided for corporate agents.

Q. Correct.

A. It was not my decision not to give his address.

Q. Was he employed by the company at that time?

A. On April 3rd, he was not.

Q. As a matter of fact, he had been gone for a year and a half, Isn't that true?

MR. LIEBERMAN: We would move to admitt Defendant's 15, Your Honor.

THE COURT: It will be received.

(Defendant's Exhibit No. 15 received in evidence.)

By Mr. Lieberman:

Q. Directing your attention to on or around April 14, 1983, did you have a conversation with Robert Sarvis?

A. I did.

Q. Was that in person or over the telephone?

A. It was over the telephone?

Q. Did you call him or did he call you?

A. He called me.

Q. What was said?

A. Mr. Sarvis was calling me, he had just visited the Waukegan plant, and he had some items he wanted my advice about. He was

[129] discussing with me some organizational ideas he had about starting up that plant, particularly, about the kinds of supervisors we would have, and how they would report to the plant manager as I recall.

We talked about not using old job titles that we've used in other plants for the hourly employees but to have a singular technician classification, which would give us additional flexibility in moving the work force about.

He also spoke in that telephone conversation with me about Dennis Grohs. Relative to Dennis Grohs, he expressed to me that based on the research he had done up to that point and time, he had some legitimate concerns as to whether Dennis was going to be the kind of supervisor

who would allow us to operate the plant in the manner we intended to operate it. He specifically asked me if I would take a look at whatever was available to me, and give consideration to that, and get back to him and advise him as to how I felt about Dennis Grohs.

Q. I'm showing you what has been marked as Defendant's Exhibit 16. Can you identify 16? What is it?

A. Those are the contemporaneous notes that I made while talking to Mr. Sarvis on April 14th.

Q. What was your practice in terms of making notes?

A. I'm a big notetaker. Anytime I'm on the telephone talking important business with anybody, I take notes and try to date the notes and also indicate with whom I was speaking.

of it, is that correct?

[134] A. I approved the severance arrangements, yes, ma'am.

Q. Did you speak with Tom Lynch before he directed his charge to the EEOC -- or his response to the charge of the EEOC?

A. I'm sure I did not.

Q. Can you tell me when you were first contacted by Gold Bond with respect to being here today?

A. Yes. I was first contacted on Monday afternoon.

Q. Who contacted you?

A. I had a telephone message. I was in a series of meetings that day. I had a telephone message that Tom Lynch had called me. I, later that evening, returned his call.

Q. What did he say to you to the best of your recollection?

A. He asked me if I would be

available to come up and testify in this case.

Q. What did you say?

A. I took a look at my calendar and said I'd have to squeeze some things out, but, yes, I would try to do that.

Q. Did he say anything further?

A. Just things of a personal nature, how's the family and things. Could you be more specific?

Q. Didn't he tell you why he wanted you up here in the first place?

A. He suggested that there was some potential testimony that would come in to this case that I might need to come and refute.

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[135] Q. To the best of your recollection, could you tell me exactly what he said or as close as you can come to what he said?

A. There was discussion about the testimony that might come in from Mr. Sarvis about the April 28 meeting. I was asked to search my recollection of such a meeting, which I did.

Q. He had called you on -- did you say Monday night?

A. That's right.

Q. Did he --

A. He called me Monday afternoon. I returned it Monday night.

Q. So you didn't talk to him until Monday night, though?

A. Correct.

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[144] Ward - direct

A. Yes. We were in the midst of decertification. It was important I go there.

Q. When you were assigned the task of resurrecting the Waukegan plant, were you given a 90-day trial period to do it in ?

A. Yes.

Q. Was your mission to keep the union out of the plant during those 90 days?

A. Yes, it was.

Q. You got there on about the 12th of April?

A. The 13th.

Q. Was Mr. Sarvis there in Waukegan on that day?

A. Yes, he was.

Q. Can you tell me who Jon Roth is?

A. Jon Roth presently is a board plant line foreman, shift foreman.

Q. Was he the president of the local union?

A. He was the president of the local union, yes.

Q. For a while, he was acting board plant superintendent in Waukegan, too, recently, wasn't he?

A. Recently?

[157] Q. Yes.

Q. You wanted your supervisors to be good in labor relations, that was the most important thing.

A. I wanted them to be tuned into labor relations.

Q. Did you claim, or do you claim that your primary objective at the Waukegan plant was to foster good labor relations among the employees?

A. Do my very best.

Q. It was your primary objective, is that correct?

A. One of my primaries.

Q. Communications was really important, wasn't it?

A. Yes.

Q. It was important that the supervisors cared about the employees?

A. Yes.

Q. It was important that the supervisors be caring and sharing, is that right?

A. That's correct. That was my theme, care and share.

Q. Right. But that's not the way that you conducted yourself, was it?

A. I conducted myself exactly like that, caring and sharing. I moved my office complex out there to be amongst them.

Q. Were you curt with the employees?

A. Curt? I was always, and still am, a very firm boss.

Q. You're really direct, aren't you?

A. Very direct.

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A. Mr. Brooks told me that. Mary Ann Siegal told me that, too.

Q. That was before you discharged Dennis?

A. I believe it was.

Q. So now you are saying that Mary Ann Siegal also told you about Becky Parkman's crotch being grabbed? She told you that one, too?

A. It was at -- we went out for dinner. It was Mary Ann, Becky Parkman, and they had been -- Charlie Goyd -- there were other people present, and it was talking in gereralities about a lot of things, and that subject came up.

Q. Okay.

A. Because I had asked Becky myself if that really had happened, because Tom Brooks had informed me and shown me some notes out of a logbook.

Q. Lord knows, Mary Ann certainly would remember that one, wouldn't she?

A. I can't answer that.

Q. Tell me about Dennis tearing the tags off the unsellable wallboard. Was that a reason that you discharged him?

A. It certainly was another piece of consideration on my part to take. Donna Bittner had shared with me that piece of information. She had been working as the quality technician at the time, had tagged a considerable amount of board, and evening's run of board to be held, that it was an inferior board that

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should not be sold. She informed me Dennis came out, removed all the tags off the units of board, and directed them to be shipped out.

Q. Right.

A. She had gone to her supervisor, Murray Qualls, I believe it was, and complained to her supervisor about it. She shared that situation with me.

Q. Murray said it was just fine, didn't he?

A. I don't know what Murray had said.

Q. Murray was the supervisor of the quality control department, is that right?

A. That's correct.

Q. It was the quality control department that made sure that the board that went out met the company's specifications, is that right?

A. To the best of their knowledge, they always tried to do that.

Q. Right.

A. They weren't always successsful.

Q. Donna Bittner worked under Murray Qualls?

A. That's correct.

Q. But you don't know what Murray Qualls said. She never bothered to tell you what Murray Qualls had said about it?

A. No. I don't know what Murray Qualls did about it, said about it.

Q. Well, Murray Qualls was right there for you to ask about

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I think you might remember if from your deposition.

I would like you to turn to the second page. I would like to start -- I would like to read from the middle of the second page to you and then ask you some questions.

"Mike carefully reviewed the performance appraisals and anecdotal information regarding all of his supervisors as he prepared for the start-up. He was especially concerned that Mr. Grohs' 1981 and 1982 performance appraisals indicated deficiencies in labor relations and personnel matters, areas that would be critical to the success of the new operation. He then investigated Mr. Grohs' work recored and learned of

the following: One, during the 1981 labor negotiations with the United Cement Line Gypsum and Allied Workers International, Local 409, bargaining committee consistently complained about Mr. Grohs' inability to deal with people. "

Who told you about that?

A. The negotiations?

Q. Where did you get that information from?

A. Tom Brooks and Tom Lynch.

Q. I would like to turn your attention to page 129 of your deposition, line 1:

"Question: And what about the bargaining committee complainng about Mr. Grohs' inability to deal with people. Were you aware of that?

"Answer: Yes. Jon Roth had shared that he had

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fruitlessly attempted several times to approach management both on a day-to-day basis, and brought it at the union proposal at negotiations as a troublesome item for the employees."

A. That's also correct, too.

Q. So in other words, you are saying that you not only discussed it with Mr. Roth but now --

A. Again, I stand --

Q. -- you are adding Mr. Lynch?

A. Again, I stand corrected. Tom Brooks, Tom Lynch and Jon Roth shared that knowledge with me.

Q. With respect to paragraph 2:

"On several occasions Mr. Grohs sought to undermine his peers by spreading false rumors regarding

stealing by another supervisor as well as heterosexual and homosexual relationships of supervisory employees."

Did you ever follow up on substantiating the rumor about stealing?

A. The only thing that I had got involved with there was what Mr. Brooks shared with me in his logbook about the possibility of some supervisor Dennis said was taking money under the table from vendors. That's the only stealing that I can refer to.

Q. Do you remember the name of the supervisor?

A. Cutwell, Cudworth, or something like that.

Q. So you never followed -- you never substantiated it, is that correct? You never asked Dennis about it, did you?

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Q. So you confirmed that this was true through Mary Ann Siegal, Becky Parkman, and Tom Brooks, is that right?

A. In sequence, Mr. Brooks told me about it first in the Phoenix plant before I left. In conversations when I arrived at Waukegan with Mary Ann and Becky Parkman, they were verified through those two individuals.

Q. Is Mr. Brooks still employed by National Gypsum?

A. Yes, he is.

Q. He's still out in Phoenix?

A. Yes, he is.

Q. As the plant manager?

A. Yes.

Q. He could confirm this, couldn't he?

A. yes.

Q. If he was going to testify?

A. Yes.

Q. But he is not going to testify?

A. I have no idea.

Q. With respect to number 4:

"Mr. Grohs indicated to the previous plant manager that he would step on anyone who tried to get in his career path, a statement hardly indicative of a good relationship with peers."

That played no part whatsoever in your decision to discharge Dennis Grohs, did it?

A. No. It only highlighted -- just, again, Mr. Brooks shared

Q. You just wanted him out?

A. That's correct.

Q. You didn't put him on probation?

A. No.

Q. You didn't transfer him to another facility?

A. No.

Q. You didn't give him a chance?

A. I discharged him.

Q. You didn't --

A. I didn't do any of the things you said.

Q. You didn't give him a chance?

A. A chance for what?

Q. A chance to prove hijmself.

A. He had proven himself, proven himself that I should discharge him.

Q. So did you give him a chance?

Q. I would like to direct your attention to page 130 of your deposition, line number 20:

"Question,: Did you get the impression that he had done a good job as board plant superintendent?

"Answer: On paper, it might appear that way. I don't know. I'm a cautious person by nature.

"Uh-huh."

"Answer: So what you kind of tell me, I go and investigate."

So at least on paper, it looked like Dennis had done a good job, isn't that true, as a board plant superintendent?

A. On paper, I guess it could be interpreted I guess that way.

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Q. All these allegations of people problems took place outside the work place, didn't they?

A. No.

Q. Not on company time?

A. No, not all of them took place outside. Some of them took place on company property

Q. Oh, you mean the lewd fondling of his genitals?

A. Yes.

Q. When did you leave, September?

A. Yes, I left September.

Q. I'm sorry. Well, I would would you, please, read what it says under comments.

Q. And Mr. Chris Fraley is still employed by Gold Bond, is that right?

A. That's correct.

Q. Now, in about March of 1984, you brought a man named Junior Henkel in to run the Waukegan plant, is that right?

A. That's correct

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Q. Junior is a real nice guy, isn't he?

A. Yes, he is.

Q. You brought him in because of his years of experience?

A. That's correct.

Q. Now, Dennis was tereminated in April of 1983, and so you brought Junior in about, close to a year later, is that right?

The court: I'm sorry. Junior is

-- Ms. Baliunas: Junior Henkel is a

The Court: Okay.

Ms. Baliunas: It's Junior. He is a very experienced board plant superintendent. He was at one time, and then he became a board plant foreman.

BY MS. BALIUNAS:

Q. And you brought him in because of his years of eexperience, because at the Waukegan plant, it was important to make good wallboard, is that right?

A. We brought him in because of his years of experience and his strong ability for training people and to aid us in getting the plant in a better operating position.

Q. Right. Because Chris Fraley wasn't doing such a good job?

A. No. To aid us. We were upgrading our stafing in the plant, and Mr. Henkel was; one that was brought in to upgrade it. In the midst of a start-up of any plant, you start off with a lean, a type of operation--

Q. Lean and mean, right?

[194] A. Huh?

Q. Lean and mean, that's what you called it?

A. Yes, lean and mean. A lean type operation, and you progress by adding on and hiring people. I was fortunate to be able to get Mr. Henkel to come and join us.

Q. You needed him?

A. To upgrade the staffing, yes.

Q. Because you needed inexperienced supervisors?

A. I needed experienced supervisors. I needed additional supervisors. We were also hiring hourly people, too, because you have to do that also.

We had started out with a 12-hour shift, and then gone to two 12-hour shifts, and then gone to three 8-hour shifts. In order to emcompass

that, you have hire hourly people, operators, and also fill out staffing of supervisors, the quality department, the maintenance department, the warehouse department. It encompasses bringing on more people into the operation. Junior was part of that, part of that operation.

Q. Right.

A. Upgrading.

Q. Right. You needed his experience, you needed his years of experience.

A. Yes. I was fortunate to get him.

Q. Right.

Q. Any discussion about Waukegan with him?

A. Except -- well, yes, there was, naturally, disscusions of Waukegan. It was in regards to the challenging job that was coming up., It was going to be a very lean type of approach.. It was going to be a 90-day job to try and get the plant back in working order. It had been laid up for approximately about 18 months. I was to go in there, go through a screening process of hiring people. He cautioned me about the old type of people that had been in the plant. He gave me -- twice he gave me a breakdown; he gave me a breakdown of the supervisors in the plant at that time and then, again, when I arrived at Waukegan.

Q. In terms of this 90-day period, what if anything did he say about what that meant?

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A. He told me it was a very critical period; that 90 days, if the team of people that came in to operate the plant, that if they didn't get it, the plant would be shut back down again, they would either sell it or relocate it to another state. He told me it was very critical.

He also indicated that with the same scope of bringing the plant back into operation that there was going to be a strong effort to try to decertify the plant to try and get a different atmosphere at the plant than what was there before.

Q. What if anything did he tell you about the atmosphere that had been

there before?

A. He told me that there was sabotage in the plant. He told me attendance problems. He told me about a great deal of labor relation problems, a great deal of unrest. He cautioned me about Dennis Grohs, a supervisor in the plant. He done that twice that date and, again, when I arrived at Waukegan.

At the moment, I think, you know, that kind of encompasses some of our conversation.

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One of them was an accusation that was made to him, and he challenged it, about Dennis Grohs and a maintenance supervisor, Cudworth or Cudwell. I think it was Cudworth. Mr. Brooks challenged Dennis about it. He denied it. He couldn't prove it.

He challenged Dennis about an accusation that he had made, an alleged incident the night before or one evening that they had been out on a social event, that Dennis Grohs had grabbed the personnel and safety supervisor, a female employee, onto his lap and grabbed her by the crotch.

Q. Did he tell you what her name

was?

A. Becky Parkman.

We were talking back and forth, you know, as he was thumbing through his logbook. He told me about an accusation and showed me in the logbook where Dennis had made an accusation that him and Becky Parkman were having an affair. Donna Bittner and Becky Parkman were having an affair, indicating they were lesbians or dykes.

At the moment, I'm almost sure there was one or two more statements. I can't focus on the language or the wording for it right now.

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I asked him if some of it was in a ready-to-run condition. He said it was. I specifically asked him was the board plant silos, stucco silos in a ready-to-run condition. He said that they were.

I asked him if the pin mixer was in a ready-to-run condition. He said they were.

Upon my investigation in the plant on most of the equipment, I came to find out that the board plant silos were not in a ready-to-run condition, that they were laden with contaminated old stucco that would have drastically hurt us in our operation. The drag chains had been severely rusted where they weren't maintained and kept up.

The pin mixer, I had the lids removed and partially taken apart. It displayed to me that that was not in ready-to-run condition. The plant had, obviously, just shut down, and they left it just like that. We started to dismantle the pin mixer. Mr. Grohs had been passing at the time. I asked him if this was an example of ready-to-run equipment. He didn't even bother to give me an answer on it, and I can understand that. I made the statement to him at that time if this is an example of ready-to-run equipment in his judgment, I guess I was in for quite of a bit of a problem in the plant all over the place.

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felt compelled to ask her so I wouldn't have any doubt in my mind.

Q. What if anything else did she tell you about Dennis Grohs?

A. She told me that Dennis Grohs had a great deal of problems with the employees in the plant; that there was a constant, I guess, complaining and grieving about Dennis and his attitude in the plant. His peers were intimidated by him.

Q. Anything else? Did she tell you anything else about him or incidents, prior incidents regarding him?

A. Well, during that same conversation, I guess I'm giving you the worst of it, but the same conversation was, "Is it true that accusations were made against you and Donna?"

Again, I was very embarrassed to ask her, you know: Were you accused by Dennis of being a lesbian or a dyke. She in her own words told me, yes, that he had made those accusations and spread rumors about her, and also about Tom Brooks and her. It kind of, basically, bore out what Tom told me in the logbook.

Q. Did she say anything else?

A. Talked about Murray Qualls, Murray Qualls being a good supervisor. She talked about Jerry being a good supervisor, Dave Burks being a good supervisor. She was complimentary about the other supervisors.

Q. What if anything did she say about about Darlene Ramig and Grohs?

A. She mentioned that Darlene Ramig had come to her with a

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side, as to what went on in the plant before the shutdown, because I had heard some horrible, gruesome stories about what went on in the plant.

He was most obliging. He told me about the sabotage that went on in the plant. He told me there were employees that, knowingly, when a piece of equipment was going to break down, turned their back and let it break down. I asked him why. He said that was their way of getting even with Dennis Grohs. I asked him again, "Are you sure?"

He said, "Yes; that was their way of getting even with Dennis Grohs."

I asked him , "I hear about narcotics."

He said, "There was narcotics in the plant," he says, "that used to be in the locker room being divided."

He talked about it going through the lab at night, being kind of an open type of situation. I asked him what he had done about that if anything. He says he had reported it. I said "Who did you report it to?"

He said, "Management."

I said, "Who?"

He said, "Dennis Grohs."

I said, "What happened? What was done about those things?"

He said, "Nothing."

I said, "I find that hard to believe, nothing was done."

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He said, "Nothing was done." He says, "You wouldn't believe what was going on in here. Nothing was done."

I asked hem about Dennis. I said, "What kind of supervisor was Dennis out there? You are indicating to me that there might be a problem there."He said, "He was the type of guy that would sit there at his desk and just look out the window in an intimidating fashion, a higher-than thou attitude, just staring at people. He displayed an uncaring attitude about people."

I asked him, can you give me some specifics so I can best understand what you are talking about in this area?"

He says, well, he says I had an employee come to me complaining one

day that Dennis was making some bigatory-type remark to him.

I think Jon did tell me -- you have to forgive me, I have already said a few nasty things here today, but Dennis called the person a nigger and, on another occasion, a boy after several times being asked, "Don't call a black man boy, " ignoring that.

He mentioned -- I'm thinking. I'm trying to recall. There is, still again, something in my mind that I can't focus on right at the moment.

He spoke to me about another employee that came to him. He was very disappointed and upset. An employee had gone to Dennis and told him that he had some medical problems with one of Waukegan operations.

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Q. What were the reasons for the decision?

A. I only 1 had 90 days to get that place up. Ninety days in that type of an operation, it's a heavy industrial operation, in 90 days with the smallest crew that I have ever known to start a plant up with the least amount of supervisors I have known to start a plant up, I didn't have that luxury to take any calculated risk in having somebody out there that would undermine my efforts and the efforts of other people.

Q. Did you discuss your conclusions with anybody else?

A. I reported my decision to Mr. Sarvis.

Q. Did you report directly to Sarvis?

A. Yes. He was a managing director, I think was his title. That is who I reported to. I called Mr. Sarvis up, told him of my decision.

Q. Approximately when did you call him, Mr. Ward?

A. I want to say a few days before the actual act of discharge. I called him up, and I gave him my reasonings of why I felt that Dennis Grohs had to be discharged. He questioned me on my decision.

Upon the completion of our converstation, he agreed with my decision wholeheartedly. He said check through human resources, get a hold of the company attorney. He mentioned Tom Lynch's name, because to him was negotiating with the plant all the time, to get with Tom Lynch and run it by him to see if there

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Q. So you were in charge of Dennis Grohs then, is that right?

A. I was.

Q. And Murray Qualls?

A. No. Murray Qualls was a quality supervisor. At the time he ran the mill, I had a side -- I, too, was-- when we had the layoff, we all took on different responsibilities. Although Murray was running the mill, there wasn't that much opportunity for me to supervise him.

Q. But before the layoff, you supervised the mill superintendent, the board plant superintendent, quality control, and maintenance, is that correct?

A. Quality control was not a direct responsibility of mine, no.

Q. But you did supervise Jerry Orrick then?

A. Yes.

Q. During the time that you were there, could you describe the hourly labor force.

A. Hourly labor force was made up of perhaps three groups. There were a few people who had been there almost since the inception of the plant who I felt knew their work and went about their work nicely.

There was a group of people that ran in an area of eight to ten years. They were not as good as the older group, but they had developed skills.

There was a new group, many, many new hires over the recent years, average age of 22, I think, of those hires. There

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were drug problems evident. The people, the newer people did not seem to have much concern for their jobs, and they were not skilled.

Q. Where were these unskilled people located, do you remember?

A. Primarily in the board plant. The other departments had the more established people.

Q. Now, you mentioned that drugs were a problem. Did Dennis Grohs attempt to stop the drug problem?

A. All of the supervision of the plant tried to do something about the drug problem, unfortunately without much success.

Q. To your knowledge, did Dennis Grohs in any way cause the durg problem?

A. Not at all. That was from the area.

Q. Was there any sabotage at the plant during the time you were there, sabotage?

A. Yes. In one case, there was a shift, the final shift of the week just before shutdown for the weekend decided it would be nice to go home early, kind of like a bunch of school kids wanting to go home at recess. They decided a good way to do it would be to break the plant down. One of them took a heavy steel bar, say, three-quarters inch, stuck it through a drive chain in the kiln. When that hit the obstruction, it broke the chain and shut the plant down. They knew that with the heat -- this is dry-running at 400 to 500 degrees -- that it wouldn't cool off rapidly enough for the maintenance people to repair it, and we

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with their work?

A. He certainly did. He, of course, had years of experience in the mill. When Orrick was working over there and needed assistance, Dennis was always ready to help him. Dennis knew the maintenance problems of his department and was able to help the maintenance department.

Q. Now, you worked as a supervisor. Did Dennis cooperate with you?

A. Pardon?

Q. Did Dennis cooperate with you?

A. 100 percent as far as I am concerned.

Q. Would you consider him to be a team member?

A. Yes. He worked closely where we worked in production. He had to. He had to work with the warehouse

superintendent, he had to work with the maintenance superintendent, and he needed to keep contact with the mill and worked with the mill because of Jerry's need.

Q. Would you describe him as a company man? Was he loyal?

A. Extremely.

leading the witness.

A. He was a good company man.

Q. Could you please describe Dennis's job performaance while he

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worked under you, his strengths and his weaknesses.

A. Dennis was very strong on quality and worked hard to give the market what they needed. He would go down to safety. He knew how to make board, both in the physical formation and good in the additives side. He knew his equipment and had good judgment as to what he needed to do to keep his equipment running; a strong superwisor, good leadership.

His weaknesses lay more in the areas of paperwork, reporting. Inventory was a major item, and he didn't have a background and had to develop understanding how to report and control that. He was a little rough at people. He had short shrift

for a man he felt was not doing his job, not interested in his jobs. He would speak brusquely, give them little attention. But a man who needed help and was a good employee, I felt he was almost paternalistic.

These things, of course, equal treatment of people across the board and letting people have their side of the story, of treating the discipline in the same manner every time, equally and fairly, were areas where I had asked him to work towards improvement.

Q. Was that because in the collective bargaining agreement, they didn't provide for steps of discipline?

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A. There was no provision.

There were some side agreements at various times, but the majority of the time that I was at the plant, we had nothing to guide us. We had to develop our own system which would stand scrutiny in cases of arbitration or where our thinking on the matter might be questioned.

BY MS. BALIUNAS:

Q. Is that what you were doing then with Dennis, developing this disciplinary system?

Q. Did Dennis have people problems?

A. I don't think so. Problem people

Q. You mean the people who worked under him?

A. The people that worked under him, he had some problem people.

Q. Now, you said that you were working with him on this system of discipline. How was he doing?

A. He was trying to do a good job. He had three foremen, and

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he, in turn, had to pass this onto them as well as curing a few of his own inclinations or experiences in a natural way of performing. He was making progress, doing fine. I was satisfied with what he was doing.

Q. How did Dennis do with respect to labor relations when he was the mill superintendent?

A. His relations there were excellent. It's a small department, I believe 10 men, a slow-moving department where there was time for him to get around and talk to his men. He knew them all and had lots of opportunity to guide them and train. I think he did an excellent job.

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Q. What is the difference between mill and board plant then?

A. Board plant is 39 or 40 people with three foremen, a high-speed operation with instant variations requiring good reaction.

Q. Mr. Coventry, could you tell me, when Dennis worked under you, where did labor relations fall in his list of priorities?

Q. Was it a priority that you had given him to do?

A. As far as management by objectives, the objective sheet that we prepared, it was not in the leading areas of responsibility. It was an area of responsibility, but it took back seat to the management objectives which we listed each year.

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Q. How did Dennis get along with the other supervisors from what you observed?

First of all, how do supervisors in a plant like that get along?

A. Sometimes there is a lot of fights. The board plant superintendent is the core of the plant; he's the hub. The mill feeds to him, the warehouse depends on him. He feeds them, but they depend on him, bring him their requests. Maintenance has to center around the board plant, because it is the major area of time, maintenance, not always the greatest cost but time, manpower.

It's a department which operates

sometimes seven days a week and is always -- it's the major profit center in the plant, the largest budget and largest opportunity to make a profit for the plant. Board plant superintendent has a lot of pressures, and he has to sometimes fight for what he needs. That is not always gentle. Sometimes they get a little rough with each other. Dennis spoke very directly, and sometimes this hurt a feeling or two.

But all in all, in this plant, I don't feel that anything Dennis did or said caused any interruption, any problem in production. We would have a day of hurt feelings or so and go back to work.

Q. Did other supervisors have friction between themselves?

A. Yes. He would have it between the mill and the warehouse

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up. He thought that she was capable of advancing as near as I can remember.

BY MS. BALIUNAS:

Q. Did Mr. Brooks come to you and say anything about Dennis's grabbing Becky Parkman by the crotch, Mr. Coventry?

A. No. I was very close to Becky. I believe I worked closely with her. I believe if Dennis had grabbed her by --

Q. Let me just ask you this. Did anyone ever mention anything about Dennis's grabbing Becky Parkman by the crotch to you at all

A. No.

Q. -- during that time?

A. No.

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Q. Or sitting her down on his lap?

A. No.

Q. Now, you had mentioned that you were close with Becky.

A. Yes.

Q. Why do you say that you were close with Becky?

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Q. I believe you testified a few moments ago that Mr. Brooks, to your knowledge, did not feel that Mr. Grohs had problems in labor relations, is that correct?

A. Corrrect.

Q. Mr. Bowers, did he feel that Mr. Grohs had problems in labor relations?.

A. Not to my knowledge.

Q. I am showing you what have been marked as Defendant's Exhibits 1 and

Q. I ask you to look at those and tell me if you recognize them.

A. Yes.

Q. Are those appraisals you filled out on Dennis Grohs?

A. Yes.

Q. When you would fill out those appraisals, would you give them to your boss?

A. Yes.

Q. And then discuss them with the employee, correct?

A. Yes.

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quality.

Now, I was not there, but as I heard it back, job performance, people who didn't care about their jobs. Yes, Mr. Grohs was reported to have said: Some of you people won't be here, or we don't want some of you people here -- some such thing, which is part of the finesse.

Q. And that speech caused quite a ruckus?

A. All kinds of loud noise, yes.

Q. Mr. Coventry, did Dennis ever do anything to improve the morale of the employees in the board plant?

A. Yes, many, many little things which I can't remember. But one of the major ones that made a tremendous

difference in working conditions, when I got to the plant and when Dennis went in red rain from the ceiling, condensation. Down at the wet transfer knife area, sometimes the whole floor would be covered with water inches deep. Along the kiln, the operators had to open doors to let cold air in to get the kiln cool enough at times when they needed to reduce temperature. They didn't have enough control on the burners.

(265) Dennis in, I don't know how long, but started to recognize where that problem was. We had a vice-president, Robert Beck, come through the plant and talk to Dennis. Dennis did a job of selling Mr. Beck on the need to change the burners that were there.

To digress a little, previously in the plant, perhaps '77, '76, they had had trouble with getting the production they wanted, and they thought that the originally installed-burners on the kiln drier -- these are big gas burners -- were inadequate. So they had someone come in and give them an offer on a larger burner. Then they had installed those. As he looked into it, we

found out these burners were as much as three times too large for the kiln.

But, anyway, Dennis had gotten Mr. Beck's interest. Mr. Beck went to work and eventually just ordered us to shut the plant down and fix, put back the old burners. We did, and it made a vast improvement, cleared up a majority of the water problem that was so evident that reduced the need of operators to open and close doors. It took the heat off the wiring, which was along the ceiling line, by those open doors. Sometimes it resulted in overheated the wires and causing shorts. It was a definite improvement, and morale went up with that improvement.

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Q. Just one question, quickly. As of 1981, you felt, did you not, that Dennis Grohs was inconsistent in his labor relations approaches?

A. And everybody in the plant, every supervisor in the plant.

Q. Calling your attention again to the second page of Defendant's Exhibit 2, the concluding remarks, is that your writing under there (indicating)?

A. Absolutely.

Q. And you said there:

"Needs to establish uniform departmental procedures and labor relations."

A. That's corrrect, in regards to discipline, because we had no written law to follow. We were left

to develop our procedures, and we needed to be uniform throughout the plant. Dennis with three formen under him had a special problem of being uniform across three shifts with three different foreman.

Transcripts of Proceedings Feb. 18, 1987

Qualls - direct

Q. Did Dennis remain at the Waukegan plant during the shutdown?

A. For the most part. He traveled out to the Medicine Lodge plant to help with that plant start-up and some training of people out there as well as I did. I traveled, and Dave Burks went out.

Q. Who sent him to Medicine Lodge, Kansas?

A. At that time it would be Clay Gray, who was the supervisor that I reported to.

Q. Who was the plant manager?

A. The plant manager of Medicine Lodge?

A. Yes.

A. Jack Dooley.

Q. Who was the second, the production superintendent?

A. Ford Clemmens.

Q. Did you have a discussion with either of them about Dennis's job performance?

A. I know they were pleased with Dennis. I don't know that I ever specifically talked with Jack Dooley but Ford Clemmens was a very good friend of mine. Ford always was very complimentary of all of us that were there, very much so.

Q. How was it that Dennis went back several times?

A. At the Medicine Lodge request and Clay Gray's he was asked to be sent back for continued help at Medicine Lodge.

for different situations. We make-- we had 12 different types at that time. We made wallboard that would go for bathrooms. It was a moisture-ressistant board. We made shaft liner which was an inch thick and was for elevators and odd buildings. We made fireproof board for office buildings or houseing, and several different types, shapes, and forms.

Q. How many different product lines did you have when you were the board plant superintendent?

A. We had 12 at that time.

Q. Now, you mentioned that you had to make the wallboard as efficiently as possible. What did you mean by that?

A. Well, that was to make it as, I guess, as fast as I could and a quality product.

Q. What did you do to make sure that you were making the wallboard as fast as you could?

A. Well, I was responsible for raw materials. I was responsible for seeing that people manned the shifts, people were doing their jobs safely on the job. It's all part of it.

Q. Was it important for people to be on the job, Dennis?

A. Oh, golly, yes. It was a continuous operation. One man could hurt you very badly at times.

Q. Was it important for them to do their jobs safely?

A. Absolutely. Safety was the number one priority most of the time. I should say all the time. It was the number one priority with the company and plant.

Transcript of Proceedings 2/19/87

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Q. Now, you said that it was important to have people on the job. Did the company have an attendance policy?

A. We did. We had a very strict policy, yes. It allowed people time off to a degree, but it also, which there was no -- how do I want to say in English -- the union had no right to file any grievance on it. It would gradually get too a discharge position where a person could be discharged. And there was no recourse for the union to take because it was nonnegotiable. I think that's what I want to say.

Q. Did you follow this attendance policy, Dennis?

A. Yes, I did, to the letter.

Transcript of Proceedings 2/19/87

Q. You also mentioned safety. Was there a safety policy at the company, also?

A. Yes. We always had an on going safety program. We had a JSA program going, job safety analysis, where the foremen work right with each person on the job instructing the correct way to doing the job, and also to have this all typed up. It was typed up and put in a notebook that anybody could read that did the job and would be able to do it right.

Q. Was that done by the company or by you, that particular thing?

A. It was done plant-wide, supposedly.

Q. Did you do something yourself in the mill department with respect to safety?

A. Yes. I had started that several years --

Q. That's right, in the mill and the board plant?

A. Yes, I had started in the mill several years before?

Q. What did you do?

A. With the mill? I don't understand.

Q. Well, with the mill and the board plant.

A. Yes. We didn't have any accidents in the mill. One that I recall, but that was lost time.

Q. Tell the court what you did to make the board plant a more safe place when you took over.

A. Well, we continued with this program. Well, I just insisted that this program be followed, this training of the people on the job.

Q. Did you set up some job descriptions?

A. Oh, yes, yes, by all means. That's what I just said. We typed them all up. I had the foreman work with each person on his crew and going over his job with him, and you know, both putting, have an input into it, the employees, too, you know, along with the supervisor. And when they agreed to a safe way of doing it, it was typed up that way for everybody to see.

Q. Did you follow the safety policy of the company then?

A. Absolutely.

Q. Now, there was a collective bnargaining agreement also, is that true?

A. Yes, there was.

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Q. As superintendent of the board plant, did you follow the terms of the collective argaining agreement?

A. I certainly did, to the letter.

Q. Did the collective bargaining agreement provide for a system of discipline of the employee at the time?

A. No. They had their own procedure but no system of discipline.

Q. From 1972 until the end of 1981, were you a superintendent at the plant?

A. Yes, I was.

Q. How many grievances did you have filed against your departments during that period of time?

A. About one a year.

Q. Who appointed you to the position of board plant superintendent?

A. Byron Bowers.

Q. When were you appointed to that job?

A. In November of '79.

Q. At the time that Bowers appointed you to the job, did you have a conversation with him?

A. Yes, I did.

Q. Where did it take place?

A. In his office.

Q. What did he say?

A. He said that we needed to get a little discipline in the

board plant. He said we needed to start knocking some heads together is what he said.

Q. When you first became board plant superintendent, describe the conduct of the employees in the board plant.

A. Well, it was very -- the morale was loose. The attendance was terrible. Safety records were terrible. The morale was just generaly bad.

Q. What about the condition of the plant, the board plant itself?

A. Yes, the board plant itself when I went down there, I was under the impression that it was going to be a people problem. That's what I thought I had. But when I got down

there, and it didn't take too long to discover that I had a lot of mechanical problems, also.

Somewhere -- down at the wet-end transfer, the place looked like it didn't have a roof on it. It just rained all the time in there, condensation, electrical problems, wires shorting out, fuses blowing. The kiln had hardly any safeties that worked in it. The guy had to stand and water to jump out a relay to light the burner on the thing. That's how bad it was.

Q. Did you do anything about it, Dennis?

A. Yes, I did. We had a vice-president, Mr. Beck, come into the plant, shortly after I board plant superintendent, as a matter of fact, and he wanted to tour the board plant, and he did that without me. I'm sure he wanted to talk to the

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their importance, and this is what I was rated on.

Q. Now, you received a competent rating in October of 1980. Under comments of present superior, on page 2, it says that: "Dennis has worked very hard to improve board plant performance. He is weak in labor relations but is working to improve in this area. Dennis' rating is competent but is very close to outstanding."

First of all, was labor relations one of your accountabilities?

A. It was not an accountability; it was a responsibility, yes.

Q. But it was not something that was discussed with you by Mr. Coventry at the beginnning of the year?

A. No. No, it was just -- this was at the time of my evaluation here.

Q. Please, to the best of your recollection, did you have a conversation with Mr. Bowers with regard to this performance appraisal?

A. Yes, I did. He was very pleased with my efforts in the board plant, and as he says, he wanted to give me an outstanding, but there were reasons he couldn't One, basically, he had it documented in writing as it says right here on this thing. He gave me a good raise.

Q. Did he tell you why he had put down, "He is weak in labor relations?"

A. Well, when you have a competent rating, they always put down

a weakness. They have to have a weakness on it. Otherwise, I guess you'd be perfect if you didn't have something wrong with you.

Q. Now turning to -- well, I want to ask you a few questions before we get to No. 12.

Dennis, did you attend a supervisors' dinner in June of 1981?

A. Yes, I did.

Q. Where was the dinner held?

A. At the Pepper Club in Waukegan.

Q. Approximately how many persons attended the dinner?

A. Approximately 25.

Q. What time did the dinner start?

A. It started at 6:30, and I got there at 7:30.

Q. When did you leave?

A. Approximately 9:30, 10:00.

Q. At that dinner, did you have a conversation with Darlene Ramig?

A. I did.

Q. Did she approach you, or did you approach her?

A. I approached her.

Q. Why did you approach her?

A. Well, I was sitting next to Charlene Koschalk at the dinner. I was the last one to come to dinner.

Q. Who is Charlene Koschalk?

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June of 1981?

A. Yes, I did, in October

Q. In October.

A. Yes.

Q. Now, take a look at the performance appraisal. You were rated competent.

A. Yes.

Q. Was labor relations one of your accountabilities at that time?

A. No, labor relations was not one of my accountabilities.

Q. Now, Mr. Brooks indicates under comments of appraiser superior:

"Overall rating is a strong competent. He has done a very good job manufacturing a quality product. Sales districts are very pleased with the quality. Needs to improve

on maintaining a consistent housekeeping program. Objective is 90 or better. Has improved in labor relations but still needs to work on developing a little bit more finesse."

Now, did you have a conversation with Mr. Brooks about your job performance, about this appraisal.?

A. Yes, I did.

Q. What do you recall him telling you?

A. Well, again, he was very happy with the job that I had done in the board plant. He gave me a good raise, I think $155. if I recall right.

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that we were supposed to run, and I went to Medicine Lodge to train people, to start up a plant several times.

Q. Approximatly how long altogether did you spend in Medicine Lodge training people?

A. Approximately three months, off and on.

Q. Other than training people at Medicine Lodge, did you do anything else?

A. Yes. I relieved the board plant foreman there who went on vacation at one time for a week. I relieved the board plant superintendent for a week in the old plant while he went on vacation.

Q. So you were supervising the employees when you --

A. Yes, absolutely.

Q. You were also working side by side with employees?

A. Yes. On the new line when we were starting it up, I was training people.

Q. Who was in charge of the plant at that time? Who was the plant manager?

A. Jack Dooley was -- of the Medicine Lodge plant.

Q. Yes.

A. Or outs?

Q. No; Medicine Lodge.

A. Jack Dooley.

Q. Who was the production superintendent?

A. Ford Clemmens.

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Q. Did they say anything to you about your job performance at Medicine Lodge?

A. I don't recall them saying anything unusual, you know. They keep inviting me back to help them some more.

Q. Did they criticize you in any way?

A. No. They never criticized what I did.

Q. Now, who was your supervisor the time that you were -- during the shutdown, Who was your supervisor?

A. Murray Qualls.

Q. Did Murray ever indicate that he was displeased with you in any way?

A. Displeased?

A. Displeased.

A. No. No, never.

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Q. Were you still considered to be entitled the board plant superintendent, though?

A. I had the title of board plant superintendent, yes.

Q. Could you please tell the Court what happened on the day of your discharge.

A. Well, there ain't much to tell.

Q. On the day of your discharge, could you please describe to the Judge what happened.

A. Yes. I was over in the warehouse, and he sent Dave Burks over to get me. Burks told me that the boss wanted to see me. So I went over there. And I went in, and he said close the door, you know. He said,

"I'm going to terminate you" And then Tom -- Tom was in there at the same time, Tom Lynch, and he --

Q. You have to speak up a little bit, Dennis.

A. Oh, I'm sorry. Tom Lynch was in there, also. And at that time Tom

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indicated that if I would resign, he would type up my resumes for me and keep my insurance intact and my retirement benefits intact, and find me another job. And I asked him, "If you are going to do all this, Tom, what in the devil are you firing me for?"

And then I turned to Ward, and I said. "Why are you firing me?"

And he says, "You got trouble with your peers, can't get along with your peers."

And very little said after that. There was no point in me hanging around, I guess. I did say, too, I says, "Who in the hell is there to get along with? There is just Murray and Dave and Orrick here, just the four of us." I said, "There is only the four of us here. Who's here to get along with?"

Transcripts of Proceedings 2/19/87

(378) Spitz - direct

Q. Do you know a man named Robert Sarvis?

A. Yes, sir.

Q. How do you know him?

A. He was director of manufacturing reporting to me.

Q. How long was he in the position of director of manufacturing

reporting to you?

A. He became director of manufacturing on March 28, 1982. Before that, he was managing director of the Manchester, New Hampshire plant and the Mobile, Alabama plant.

Q. You said 1982. Is that correct, 1982?

A. 1983. I'm sorry, sir.

Q. He was in that position until when?

A. Until the fall of '83.

Q. Did his duties in that job have anything to do with the Waukegan plant?

A. Yes. He was director for the Waukegan plant.

Transcripts of Proceedings 2/19/87

Q. When was he given responsibility for the Waukegan plant?

A. March 28, 1983.

Q. I have handed you what has been marked as Defendant's Exhibit 17.

Do you recognize that?

A. Yes, sir.

Q. What is it?

A. First off, it's an announcement announcing Bob Sarvis changing his responsibility from managing director to director of manufacturing and adding the Waukegan plant to his list of responsibilities.

Q. Is that your signature at the bottom of the exhibit?

A. Yes, sir.

Q. I'm sorry; I didn't hear you..

Transcripts of Proceedings 2/19/87

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A. Yes, sir.

Q. What is it?

A. It's the termination notice that I handed to Mr. Sarvis.

Q. Is that your signature on the notice?

A. Yes, sir.

Q. Did you give this to Mr. Sarvis on or about November 4, 1983?

A. Yes, sir.

Q. Calling your attention to March 28, 19893, where were you that day?

A. At the Waukegan plant.

Q. Why were you at the Waukegan plant that day?

A. We had discussions about starting the plant up, and I wanted to see the physical condition of the plant.

Transcripts of Proceedings 2/19/87

Q. Who if anyone with the company did you meet with at the plant that day?

A. Murray Qualls.

Q. Was Mr. Sarvis at the plant that day?

A. No sir.

Q. Was Mr. Ward at the plant that day?

A. No, sir.

Transcripts of Proceedings 2/19/87

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Q. Other than that trip on March 28, were you ever at the Waukegan plant during March or April?

A. No, sir.

Transcript of Proceedings 2/19/87

[407] Roth - direct

A. Yes, I did.

Q. When did that take place?

A. The exact date, I don't remember.

Q. Where did the conversation occur?

A. In the board plant.

Q. Besides Mr. Michalowski and yourself, was anyone else present?

A. No.

Q. What did he say and what did you say during that conversation?

A. He came up to me one day before the start of the shift and told me that his wife had been in an accident the previous day at home, and that a call had come into the plant for Rick to get ahold of his wife immediately; and that of message had been delivered to Dennis Grohs, and Dennis never relayed the message to Rick.

Transcript of Proceedings 2/19/87

Q. What did you do after Rick told you that?

A. I went into Dennis's office and asked him about it.

Q. Was anyone else in the office at the time?

A. No.

Q. What did you say to Dennis, what is did he say to you?

A. I asked him if he had received a message for Rick Michalowski to call home. He said yes, he did, but he didn't think at that time it was that important.

Q. Did he apologize for not passing on the message?

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A. No.

Q. What did you do after talking with Dennis?

A. I went and talked to Rick, told him Dennis's answer. I think it was one day later, Rick went into the office and asked him about it.

Q. Do you know a man nanmed Arnie Campbell?

A. Yes, I do.

Q. Who is Arnie Campbell?

A. He was an edge person?

A. An employee that forms the edges of the dry wall before it hardens.

Q. Did he hold this job before the plant shutdown?

A. Yes, he did.

Q. Calling your atttention to 1979, did you have a conversation with Mr. Campbell about Dennis Grohs?

A. Yes.

Q. When was that conversation?

A. On that exact date, I don't remember either.

Q. Where did you have the conversation?

A. That was in the board plant department before the start of the shift.

Q. Was anyone else present besides Mr. Campbell and yourself?

A. No.

Q. What did Mr. Campbell say to you and what did you say to him?

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A. That's what I just said. He wanted to go home early.

Q. He just wanted to go home early.

A. Yes.

Q. What shift was that on?

A. The second shift, I believe.

Q. And there was an investigation.

A. Yes.

Q. And people took lie detector tests or something like that?

A. Yes.

Q. And the person was found who did it and discharged.

A. An voluntarily came in, and the company gave him the option to resign, or they would pursue it and prosecute. So he resigned.

Q. Other than that instance and the fire in the lunchroom then, can you

recall any other instances of sabotage?

A. No.

Q. Do you recall during your deposition, you could only recall the fire in the lunchroom?

A. That's all I was asked about.

Q. I think I asked you more than that.

A. That's one thing you brought up specifically. So that's what is I commented on.

Q. With respect to those 1981 union negotiations, the collective bargaining committee met with certain people from the company. Both Tom Brooks and Tom Lynch were present. They were two of the

people that you were meeting with, is that right?

A. Yes.

Q. During those negotiations, you did not mention Dennis Grohs's name, did you?

A. No.

Q. Your disagreement with the company was that Dennis was following plant or corporated policy, and you with complaining about the policy.

A. He was going overboard on corporate policy.and you were complaining about the policy.

A. He was going overboard on corporate policy.

Q. Well, he was following the policy, isn't that right?

A. He was following Dennis's policy, which extended from corporate policy.

Q. Turning your attention to your deposition, page 36, line 23:

"Question: In other words, what you are saying getting him out was not part of your negotiations, is that what you are saying? Am I hearing that right?

"THE WITNESS: It would be things that Dennis would be doing that we have disagreements with him on, but he would be following plant or corporate policy when he is doing them. So it's not aimed at a particular individual; it's aimed at a policy."

Do you remember saying that?

A. Not word for word, but I remember saying it, yes.

Q. As a matter of fact, if you didn't like what Dennis was

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doing, you could always file a grievance.

A. Right.

Q. Your general feeling about Dennis was that he was too strict, is that correct?

A. Yes.

Q. Isn't it true that the problems, you brought the problems in Dennis's area more than any other areas because that was where the consentration of the people were, and you had three shifts versus one shift?

A. That's true.

Q. At that same time, didn't you also feel that some of the supervisors were too lenient?

A. Not really lenient. They were all going in their own directions.

Transcript of Proceedings 2/19/87

Q. My question on page 43, line 6, was:

"Did you feel that any of the supervisors were lenient because they just didn't care what the employee did?

"Answer: A lot of them were. Some of them were afraid of the employees."

A. True.

Q. Do you recall that answer?

During these negotiations when you mentioned these problems stemming from Dennis Grohs following company policy too strictly, Tom Lynch and Tom Brooks were firm in their response that it would stay like it is, weren't they?

Transcript of Proceedings 2/19/87

A. Pretty much so, gentlemen.

Q. As of the date that I took your deposition, which was the 28th of January 1985, isn't it true that the company still had the same strict policies as before?

A. The same policies.

Q. The same strict policies.

A. It depends on how you look at them.

Q. Turning your attention to your deposition, page 61, line 12; employees now than they were before when Mike Ward was there? Was management more lenient with the employees?

"Answer: No.

"Than before?

"Answer: No. We still have the same policies.

Transcript of Proceedings 2/19/87

"Question: When I Mike Ward was there?

"Answer: Yes.

"Than before?

"Answer: They may be explained a little better to the employees than it was when he was here.

"But still the --

"Answer: Same policies, yes.

"Question: The strict policies?

"Answer: Yes."

Do you remember?

A. At that time, yes.

Transcript of Proceedings 2/19/87

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Q. Isn't it true that the problem was that nobody would talk to Mike?

A. Yes.

Q. Isn't it true that that was because everytime you said something to him, he would find some fault with what you said?

A. Yes.

Q. So nobody said anything to him.

A. Corrrect.

Q. After Michael gave you this memo, did you start talkijng to him?

A. A little bit.

Q. Not too much?

A. Well, sure. I was putting in 17, 18 hours a day. I didn't feel like talking to anybody anyway.

Q. Is it true that Mike Ward was grooming Dave Burks for the board plant superintendent's job?

A. I believe he was, yes.

Q. Isn't it true that Dennis Grohs' expertise and experience would have been very helpful in getting the plant started up again?

A. No.

Q. Okay. I would like to draw your attention to page 54 of your deposition, page 55, line 8:

"Question: So do you think that Dennis's expertise, his experience would have been helpful in getting the plant started

of your deposition, line 22:

"Question: Everybody was at a round tale, and Dennis looked at them and said it?

"Answer: He didn't look at them. I am pretty sure he was talking to Mary Ann Siegal when he said, quote, I think they are lesbians or, quote, them two lesbians.

"Question: Are you sure that he didn't say something like: If I didn't know any better, I'd think those two are in love? Could it be that that he said?

"Answer: It could have been."

Transcript of Proceedings 2/20/87

O'Dea - direct

Q. State your name for the record, please.

BY THE WITNESS:

A. Helen O'Dea.

Q. Where do you live, Ms. O'Dea?

A. I live in Charlotte, North Carolina.

Q. By whom are you employed?

A. Gold Bond Building Products, Division of National Gypsum Company.

Q. How long have you worked with them?

A. It will be 41 years in May.

Q. What is your current job with that company?

A. I am supervisor of accounts payable.

A. Yeah, because this was his last day there, and he indicated that he would like me to take a human relations course. I said, "Sure, definitely. This is the most opportune time to do it while the plant is down and we've got plenty of time, you know."

He says, "Good. I'll arrange it."

He gave me a good raise on this one, too.

Q. Now, Dennis, had Mr. Brooks ever asked you to take any kind of courses in the past?

A. Yes, he had. I had taken -- I went to a seminar with Jerry Orrick and Becky Parkman sometime during the summer or late fall.

Q. Of what year?

A. '81.

Q. What kind of a course was it?

A. It was a course up in Madison, Wisconsin. It was called Techniques of Hiring, I believe was the name of the course, Techniques for Hiring.

Lynch - direct

Q. You are familiar with the laws under discrimination?

A. Yes.

Q. Including age discrimination?

A. Yes.

Q. You were familiar with the laws on age discrimination in April of 1983, also?

A. Yes.

Q. The termination of a long-term employee is an important matter, isn't it?

A. Yes.

should be given to offering him a supervisory position somewhere in the company prior to the start-up. I would suggest this be somewhere besides Waukegan since Roth's human relations' skills are less than polished and are inappropriate for decertification climate."

Was Mr. Roth given a position somewhere other than Waukegan to your knowledge?

A. I would have to think back. I don't recall that he was. I think he was not.

Q. So with his people problems, he was retained in Waukegan, is that right?

A. My recollection is he was retained in Waukegan, yes.

Q. Did you recommend that Dennis Grohs get transferred to another plant as was recommended for Mr. Roth?

A. Did not.

Q. You just decided to terminate him?

A. That's right.

Supreme Court, U.S.
FILED
MAR 28 1989
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No. 88-1460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DENNIS GROHS,

Petitioner,

v.

GOLD BOND BUILDING PRODUCTS,
a division of NATIONAL GYPSUM COMPANY,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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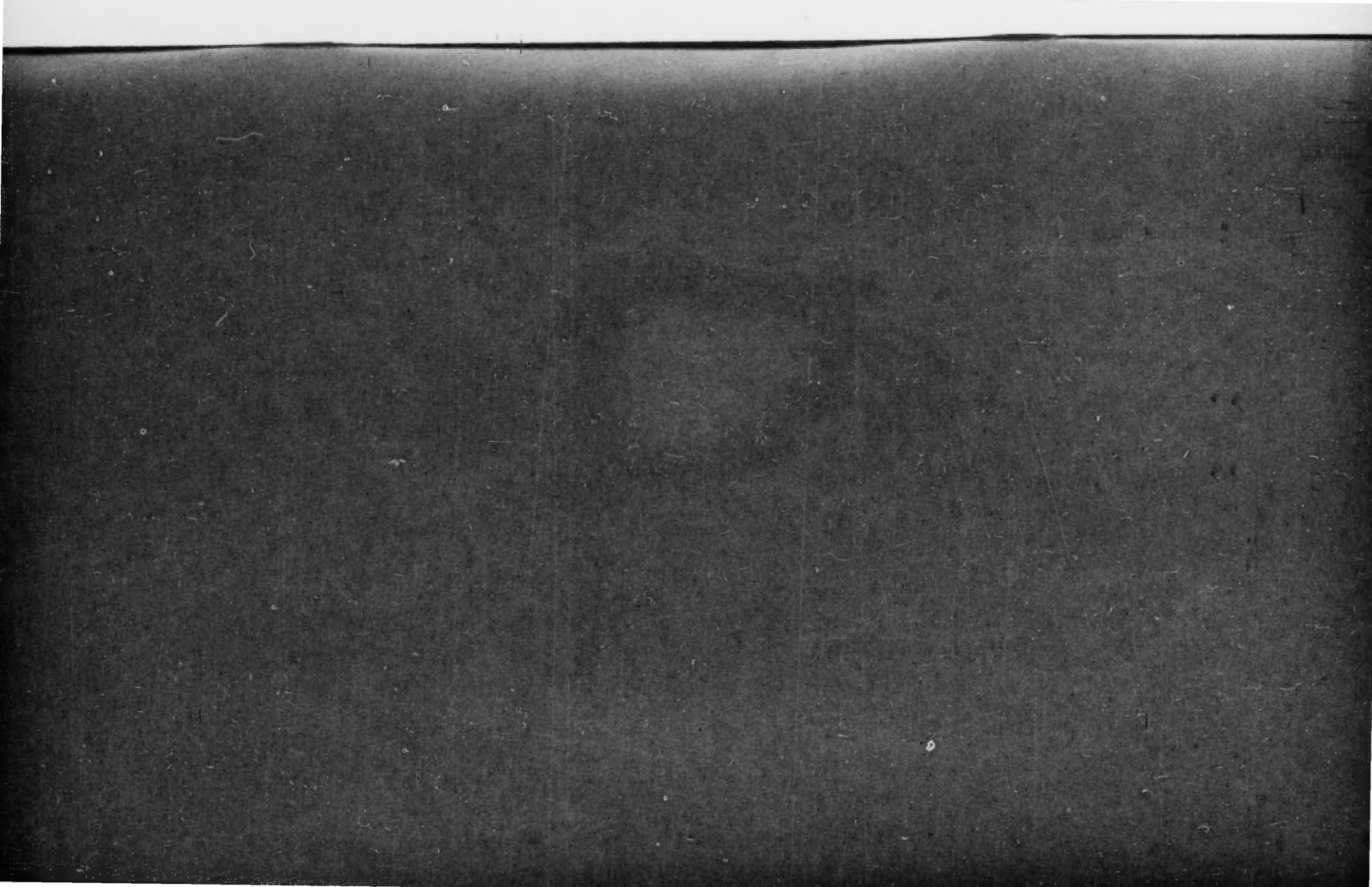

QUESTION PRESENTED

1. Whether the Seventh Circuit Court of Appeals, faced with the district court's finding that petitioner was discharged because of his age, and the district court's inconsistent finding that petitioner was discharged for legitimate nondiscriminatory reasons, properly reviewed the entire record to conclude that the district court's finding of age discrimination was unsupported by the evidence and was, therefore, clearly erroneous.

RULE 28.1 LISTING

Respondent, Gold Bond Building Products, is an operating division of National Gypsum Company. Gold Bond Building Products has no other parents, affiliates or subsidiaries. National Gypsum Company's only subsidiary is the Austin Company.

National Gypsum Company is a wholly owned subsidiary of Aancor Holdings, Inc. The majority shareholder of Aancor Holdings, Inc. is Lafarge Coppee, a French concern.

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No. 88-1460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DENNIS GROHS,

Petitioner,

v.

GOLD BOND BUILDING PRODUCTS,
a division of NATIONAL GYPSUM COMPANY,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Gold Bond Building Products, a division of National Gypsum Company, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Seventh Circuit's opinion in this case.

OPINIONS BELOW

The unreported oral opinion of the United States District Court for the Northern District of Illinois was issued on February 20, 1987 (Pet. App. 1).[1] Following respondent's appeal and petitioner's cross-appeal, the United

[1] Petitioner submitted a corrected appendix to this Court on March 6, 1989, in which he retyped (with numerous

(footnote continued on next page)

States Court of Appeals for the Seventh Circuit issued its opinion reversing the district court's decision on September 27, 1988 (Pet. App. 13). On September 29, 1988, the court of appeals amended its opinion in an unreported order (Pet. App. 24). On November 2, 1988, the court issued an unreported order denying petitioner's petition for rehearing and suggestion for rehearing en banc, and again amending its opinion (Pet. App. 25). The published opinion of the Seventh Circuit, 859 F.2d 1283, reflects both of these amendments.

STATEMENT OF THE CASE

The court of appeals accurately summarized the facts of this case in its decision. 859 F.2d at 1284-85 (Pet. App. 14c-15b). To rectify several misstatements in the petition, however, respondent has briefly set forth the relevant facts, followed by a summary of the lower courts' opinions.

Facts

Respondent manufactures wallboard at a plant in Waukegan, Illinois. Petitioner became the board plant superintendent of that plant in 1979.

In the early 1980s, the Waukegan plant suffered a substantial decline in business, leading to the layoff and termination of a large number of employees. The downturn continued, however, and in February, 1982, respondent shut down the plant indefinitely. It retained a skeletal staff of four supervisors, including petitioner, to act as custodians of the equipment.

In early 1983, respondent reopened the plant on a 90-day trial basis. Upper management determined that the earlier failure of the plant to operate successfully was due,

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(footnote continued from preceding page)

typographical errors) the lower courts' opinions, portions of the trial transcript, and the text of selected exhibits. References to that appendix are abbreviated herein as "Pet. App. —."

in large part, to exceedingly poor relations between supervisors and hourly employees (Pet. App. 2a; Tr. 81-82, 203, 405-06).[2] Respondent decided that the plant would survive the 90-day trial period only if it could be reopened in an employee relations atmosphere conducive to profitability (Pet. App. 2a). To help this happen, respondent implemented new supervisory standards that emphasized more harmonious relations between supervisors and employees, which might lead to decertification of the union (Tr. 43-45, 86-88, 127-28, 202-03, 210). If this experiment did not work by the end of the 90-day period, respondent planned to permanently close the plant.

Respondent named Michael Ward, a long-time Gold Bond employee, as the new plant manager. Ward's immediate supervisor, Robert Sarvis, instructed Ward that he had only 90 days to begin operating the plant successfully. Ward was told to place great importance on improving employee relations (Tr. 43-45, 202-03).

Shortly before Ward assumed control of the Waukegan plant, he asked the former plant manager, Tom Brooks, about the strengths and weaknesses of the employees. Brooks told Ward that petitioner had difficulty getting along with the plant employees, and that he was disliked—even hated—by most of the hourly work force. Brooks also cited complaints from female employees that they had been sexually harassed by petitioner. Brooks told Ward that Becky Parkman, the personnel safety supervisor, had complained to him that petitioner had grabbed her by the crotch during a supervisors' dinner and, a few months later, referred to her and another employee as lesbians. Brooks also said that Darlene Ramig, the payroll secretary, had complained that petitioner had suggested that he would help her get promoted if she went to a nearby motel with him. Parkman independently confirmed these incidents when

[2] References to the trial transcript, which was Item Nos. 113 and 114 of the record on appeal, are abbreviated herein as "Tr. ____."

questioned by Ward, and Ramig confirmed the motel proposition and lesbian comment in her testimony at trial (Tr. 206-07, 214-17, 433-38).[3]

Upon arriving at the Waukegan plant in April, 1983, Ward reviewed the performance appraisals of the four remaining employees. Each of petitioner's last three appraisals, covering 1980 through 1982, ranked him low in the newly critical area of employee relations.

Jon Roth, who had been the union president at the plant for 20 years, also spoke with Ward about petitioner. Roth told Ward that the rank-and-file employees "hated" petitioner, that he was the root cause of most labor-management problems at the plant, and that the union had repeatedly complained to management about him (Tr. 217-20, 405, 413, 415). Roth also told Ward that petitioner had outraged black employees by referring to them as "niggers" and "boys" (Tr. 219, 408-11, 415).

Given the strict time constraints Ward was working under, his imperative to create a harmonious employee relations environment, the overwhelming amount of negative information that he had received about petitioner, and his own observations, Ward concluded that petitioner lacked the qualifications needed for the plant's 90-day trial period to succeed (Tr. 154-55, 220-21). Ward informed petitioner, therefore, that he was being discharged for his "people problems," and because he could not fit in with respondent's new emphasis on employee relations. After Ward (then age 48) discharged petitioner (age 51), he continued the start-up of the plant by hiring three new supervisors: Roth (age 43), Junior Henkel (age 53), and Herman Fraley (age 36). Ward selected Roth as a supervisor because Ward believed that

[3]The district court overruled petitioner's hearsay objection to Ward's testimony about what he had been told by Brooks, since that testimony was offered and admitted not to prove the truth of what Ward had been told, but rather, to show Ward's state of mind at the time he fired petitioner (Tr. 204-05). *See* Fed. R. Evid. 801(c).

Roth would help respondent achieve the type of employee relations atmosphere that would lead to decertification of the union (Pet. App. 3, 6).

The District Court's Opinion

At the conclusion of the trial, the district court issued its opinion orally from the bench, ruling that respondent had committed a nonwillful violation of Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA").

The district court found that respondent made a "conscious management decision" to reopen the plant on a 90-day trial basis to see if it could be operated "under conditions conducive to long-term profitability" (Pet. App. 2a). One key "aspect of that strategy," according to the court, "was that management would stroke the work force, a little more than had previously been the practice . . ." (Pet. App. 3a). In the words of the district court: "Michael Ward certainly knew . . . that they had 90 days, basically, to turn it around. . . . [H]e wanted supervisors that wouldn't upset the hourly employees unduly" (Pet. App. 6). In other words, "[m]anagement did want a little softer supervision" (Pet. App. 11).

The district court found that petitioner did not meet these new standards. The trial judge found that petitioner was a "head knocker" who was "quite clearly strict, not terribly flexible," and "a tough boss," that Ward was "certainly aware that stroking [the work force] wasn't one of [petitioner's] strong points," and that petitioner was disliked by the employees (Pet. App. 4a, 6, 10). The district court found, therefore, that petitioner "was one kind of supervisor . . . which was *not* totally what [respondent] had in mind during the immediate future" at the plant, and that this "was a factor" in Ward's decision to discharge him (Pet. App. 6-6a; emphasis added).

The trial judge explicitly discredited petitioner's only direct evidence of age discrimination, which consisted of

testimony by Sarvis that his supervisor, Robert Spitz, had instructed Ward to discharge petitioner because he was "too old and too fat for the job." The court found that Sarvis was not "a particularly credible witness," that it was "unlikely" that Spitz was involved in the discharge decision, and that the conference call in which Spitz supposedly said that petitioner was "too old" never even occurred (Pet. App. 5, 6a).

Despite all this, the district court found that "age was a factor" in petitioner's termination (Pet. App. 6a). The court cited "a feeling that [petitioner] was expendable" and noted that respondent "didn't try to teach an old dog new tricks" (Pet. App. 6a-7). The fact that management wanted "softer supervision," according to the court, "was a factor related to the plaintiff's age in the sense that they were, in effect, saying: And we're not going to take a chance with him" (Pet. App. 11). The court described the reports Ward received regarding petitioner's "head-knocking" performance as a "laundry list of irrelevancies" that were equivalent to a "pretext list" (Pet. App. 7, 11).

The Court of Appeals' Opinion

The Seventh Circuit reversed the district court's ruling that respondent had violated the ADEA. The court of appeals held that the district court's finding of age discrimination was clearly erroneous "[b]ecause there was insufficient evidence to support a finding that age was a determinative factor in Grohs' dismissal." 859 F.2d at 1284 (Pet. App. 14b). The court of appeals focused on two contradictory findings by the district court: (1) that petitioner was discharged because Ward concluded that he was not qualified to remain a supervisor under respondent's new management style; and (2) that petitioner was discharged because of his age. After reviewing the entire record, the Seventh Circuit panel unanimously agreed that although there was considerable evidence in support of the first of these findings, there was no evidence in support of the second. The court held, therefore, that the district court

clearly erred in finding that respondent acted with discriminatory intent in discharging petitioner.

SUMMARY OF ARGUMENT

In deciding this ordinary, run-of-the-mill ADEA case, the Seventh Circuit applied well-established legal principles that in no way conflict with any decisions of this Court or the other circuit courts. After a careful examination of the entire record, the court of appeals, employing the proper standard of review, held that the district court's finding of discriminatory intent was clearly erroneous, because it was plainly unsupported by the evidence. The Seventh Circuit's application of substantive law, moreover, creates no conflict with the decisions of other appellate courts.

This wholly unexceptional case, therefore, presents no novel issues of law, no matters of national significance, and nothing of particular concern to anyone other than petitioner and respondent. Because there are no "special and important reasons" for granting review, Sup. Ct. R. 17.1, the petition for a writ of certiorari should be denied.

ARGUMENT

I.

THE SEVENTH CIRCUIT PROPERLY APPLIED THE CLEARLY ERRONEOUS STANDARD OF REVIEW.

Petitioner's principal contention is that the court of appeals violated Rule 52(a) of the Federal Rules of Civil Procedure by failing to apply the clearly erroneous standard to the district court's finding that petitioner was discharged because of his age.[4] In fact, however, the Seventh Circuit cited and applied that standard in full accordance with prior decisions by this Court and the other federal appellate courts. Thus, there is no reason for this Court to review the Seventh Circuit's decision.

[4] At least five of the eight "questions presented" in the petition are devoted to this claim, as is virtually all of petitioner's argument. Petition at pp. i-ii, 28-46, 51-65.

Applying *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), the court of appeals correctly held that the district court's finding of age discrimination could not be reversed unless it was clearly erroneous. 859 F.2d at 1286 (Pet. App. 16c). As this Court has held:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). This test "expressly contemplate[s] a review of the entire record" by the court of appeals. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). Where such a review reveals that a trial judge's finding of fact is not supported by substantial evidence, that finding is clearly erroneous. *See, e.g., Lame v. United States Dep't of Justice*, 767 F.2d 66, 69-70 (3d Cir. 1985); *Duty v. United States Dep't of Interior*, 735 F.2d 1012, 1015 (6th Cir. 1984); *Lincoln v. Board of Regents of University System of Georgia*, 697 F.2d 928, 939 (11th Cir.), *cert. denied*, 464 U.S. 826 (1983); *Cannizo v. Farrell Lines, Inc.*, 579 F.2d 682, 686 (2d Cir. 1978); *Case v. Morrisette*, 475 F.2d 1300, 1307-08 (D.C. Cir. 1973); *Rewis v. United States*, 445 F.2d 1303, 1304 (5th Cir. 1971); *S.S. Silverblatt, Inc. v. Seaboard Security Co.*, 417 F.2d 1043, 1055 (8th Cir. 1969); 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2585, at 735 (1971). The appellate courts regularly apply this test to reverse findings of discrimination. *See, e.g., Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 165 (3d Cir. 1985); *Miller v. Mercy Hospital, Inc.*, 720 F.2d 356 (4th Cir. 1983), *cert. denied*, 470 U.S. 1083 (1985); *Danzl v. North St. Paul-Maplewood-Oakdale Independent School District No. 622*, 706 F.2d 813 (8th Cir. 1983).

The Seventh Circuit properly applied these well-established rules in reversing the lower court's decision. The trial judge found that respondent decided that in order to survive the 90-day trial period, it needed supervisors who, in

management's view, could work with the hourly employees in a cooperative, nonadversarial manner. The district court also found that respondent was "certainly aware" that petitioner lacked these qualifications, and that his lack of qualifications under respondent's new standards caused respondent to discharge him.

In stark contrast, however, the district court also found that petitioner's termination was the result of age discrimination, rather than being based on legitimate business reasons. Without any supporting evidence, the lower court found that respondent viewed petitioner as "expendable" and an "old dog" who respondent "didn't try to teach . . . new tricks." Although there was no evidence that any younger employees with similar problems received preferential treatment, the court said that it "could not help but conclude" that if petitioner had been younger, respondent would have trained him how to meet the new supervisory standards. And although the court clearly credited Ward's testimony that he genuinely based his decision to discharge petitioner on the negative reports he received about petitioner's performance as a supervisor at the plant, it dismissed the events that were the subject of these reports as a "laundry list" or "pretext list" of "irrelevancies."

Faced with these diametrically opposed findings, the Seventh Circuit reviewed the entire record to determine whether they could be reconciled and, if not, to decide which finding was supported by the evidence. As this Court has held, in deciding whether a finding is clearly erroneous, a court of appeals must determine whether "the district court's account of the evidence is plausible in light of the record viewed in its entirety" and whether the district court's findings are "internally inconsistent." *Anderson*, 470 U.S. at 573-75. Applying these basic principles, the Seventh Circuit properly held that its responsibility was "to 'determine whether the trial judge's interpretation of facts is implausible, illogical, internally inconsistent or contradicted by documentary or other extrinsic evidence.' " 859 F.2d at

1289 (Pet. App. 19), quoting *Ratliff v. Milwaukee*, 795 F.2d 612, 617 (7th Cir. 1986) (citing *Anderson*). Thus, the court of appeals reviewed the entire record to see if the district court's finding of discrimination was supported by the evidence.

Petitioner contends that by conducting this review, the Seventh Circuit usurped the district court's role as a fact-finder. In reality, however, the court of appeals undertook the only logical method of determining whether the lower court's finding of age discrimination was clearly erroneous. This Court's decisions in *United States Gypsum, Bose* and *Anderson*, as well as countless circuit court decisions, make clear that where, as here, an appellant argues that a finding of fact is clearly erroneous, the court of appeals may review the entire record to determine whether that finding is supported by the evidence. Such a review is not *de novo* fact-finding; rather, it is the prescribed method for deciding whether a finding may stand on appeal. Under the circumstances, therefore, the Seventh Circuit's review of the evidence was not only perfectly proper, it was required.

Nor did the Seventh Circuit err in how it carried out that review. The court found clear evidentiary support for the district court's finding that petitioner was discharged because Ward believed that petitioner did not meet respondent's new requirements for "softer" supervision. The district court credited Ward's testimony that he fired petitioner because he believed that petitioner's personality did not fit in with respondent's new strategy of "stroking" the work force. There was no dispute that before Ward decided to discharge petitioner, he received a series of independent reports about petitioner's deficiencies in the newly critical area of labor relations. Petitioner never challenged the fact that Ward read and heard these reports, or that he relied upon them in deciding to discharge petitioner. There was no evidence, moreover, that Ward's belief in petitioner's weaknesses was not genuinely held in good faith. To the contrary, the district court specifically found

that Ward was "*certainly aware* that stroking [the work force] wasn't one of plaintiff's strong points" and that petitioner's management style "was not totally what [respondent] *had in mind* during the immediate future at Waukegan" (Pet. App. 6; emphasis added). The district court's finding that petitioner was discharged for legitimate reasons, therefore, was amply supported by the evidence.

The Seventh Circuit next reviewed the record to see if there was evidentiary support for the district court's contradictory finding of age discrimination. As the court of appeals noted, however, the record contains "sparse" evidence of discriminatory intent, "insufficient proof of disparate treatment," and "little or no direct or indirect evidence that Grohs' discharge was brought about by any concerns other than his ability to supervise employees in a 'softer' manner." 859 F.2d at 1288-89 (Pet. App. 18b, 19).[5] The court's review of the record revealed no direct evidence of age discrimination, since the district court had explicitly rejected petitioner's only such evidence as incredible. 859 F.2d at 1287 (Pet. App. 17-17a). The Seventh Circuit likewise discovered no indirect evidence to support the district court's finding that petitioner was discharged because of his age. Petitioner, attempting on appeal to create a *post hoc* justification for that finding, made three arguments that such indirect evidence existed: (1) the instances of petitioner's behavior which were reported to Ward immediately before he discharged Grohs were too far removed in time to have motivated the discharge; (2) respondent treated younger, similarly situated employees better than petitioner; and (3) petitioner's overall past performance had once been acceptable to respondent.

The court of appeals rejected the first two of these arguments as simply unsupported by the evidence. As for

[5] Given the absence of such evidence, the court of appeals observed that "it is not surprising that the district judge's oral findings of fact simply do not reflect evidence of age discrimination." 859 F.2d at 1288 (Pet. App. 18b).

respondent's supposed reliance on ancient events, the evidence showed that because the Waukegan plant had been shut down since early 1982, the most recent information about petitioner's supervisory performance at the plant dated from 1980 and 1981. Given that respondent had established new supervisory standards in 1983, focusing on how well a supervisor could relate to hourly employees, it was necessary for respondent to reevaluate the performance of its supervisors in light of these new standards. Because petitioner had last supervised hourly employees at the plant in 1980 and 1981, the Seventh Circuit properly held that it was not pretextual for respondent to review petitioner's performance from those years to decide what to do with him in 1983. 859 F.2d at 1287 (Pet. App. 17a-17b).

The court of appeals likewise dismissed petitioner's second argument, that he was discharged while similarly situated younger supervisors were retained, as devoid of evidentiary support. Indeed, the district court found no evidence of disparate treatment in concluding that discrimination had occurred, and no such evidence exists. Petitioner nevertheless contended that respondent's decision to hire the 43-year-old Roth after discharging the 51-year-old petitioner constituted disparate treatment based on age. The district court, however, explicitly distinguished Roth from petitioner, finding that respondent hired Roth because it determined that he—unlike petitioner—would be useful in decertifying the union.[6] As the court of appeals correctly noted, therefore, hiring Roth was "consistent with Gold Bond's new 90-day strategy, rather than constituting evidence of age discrimination." 859 F.2d at 1288 (Pet. App. 18c). In short, as the Seventh Circuit held, the record contained no evidence of disparate treatment based on age.

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[6]The district court found that respondent hired Roth because it would have "his leadership skills enlisted on behalf of Gold Bond," and that Ward was "aware that he wanted and needed Roth" to make respondent's new approach toward employees work (Pet. App. 3, 6).

Finally, the court of appeals rejected petitioner's attempt to base the district court's finding of discrimination on the claim that, until 1983, respondent had "accepted" petitioner's deficiencies in labor relations. The Seventh Circuit held that to the extent the district court relied on this factor to find discrimination, its finding was based upon an incorrect view of applicable law, and was, therefore, clearly erroneous. 859 F.2d at 1288 (Pet. App. 18c). *See, e.g., United States v. Singer Mfg. Co.,* 374 U.S. 174, 194 n.9 (1963); *Ritter v. Morton,* 513 F.2d 942, 949 (9th Cir. 1975); *Case v. Morrisette, supra,* 475 F.2d at 1307-08 (findings of fact clearly erroneous where induced by erroneous view of the law). In particular, the Seventh Circuit held that where, as here, an employer establishes new, more demanding qualifications, the fact that an employee's past performance had once been acceptable under less rigorous standards, does not, under well-established law, show pretext. 859 F.2d at 1287-88 (Pet. App. 17a-18b).

In sum, as the Seventh Circuit held, a thorough review of the record reveals no evidence to support the district court's finding of age discrimination. That lack of evidence made it impossible for the court of appeals to reconcile the district court's finding that petitioner was terminated for legitimate reasons and its concurrent finding that he was terminated for discriminatory reasons. Since the latter finding, unlike the former, was not supported by the evidence, and was based on an erroneous understanding of applicable law, the Seventh Circuit properly reversed the finding of discrimination as clearly erroneous.

Contrary to petitioner's arguments, therefore, the Seventh Circuit applied the appropriate standard and method of review to the district court's findings—a standard and method long endorsed by this and every other federal appellate court. Accordingly, there is no reason for this Court to review this case.

II.

THE SEVENTH CIRCUIT'S APPLICATION OF SUBSTANTIVE LAW CREATES NO RELEVANT CONFLICT WITH DECISIONS BY OTHER CIRCUITS OR THIS COURT.

Petitioner implicitly asserts that this Court should grant review to resolve a purported "conflict" between the Seventh Circuit's decision in this case and the Fifth Circuit's decision in *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988), concerning a plaintiff's burden of proof in establishing a prima facie case of discrimination. Petition at pp. ii (question 5), 47-51.

Even assuming, *arguendo*, that any such conflict over the elements of a prima facie case did exist, it would be irrelevant to this case. Once the trial of a discrimination case has ended, the question of whether the plaintiff established a prima facie case no longer matters. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).[7] Specifically applying that rule, the Seventh Circuit did *not* base its decision on whether or not petitioner had established a prima facie case; rather, consistent with *Aikens*, it properly focused on the ultimate issue of "whether there was sufficient evidence to support a finding that age was a determinative factor in defendant's dismissal of the plaintiff." 859 F.2d at 1286 (Pet. App. 16a). Any so-called "conflict" among the circuits on how a plaintiff proves a prima facie case, therefore, is irrelevant to this fully tried case, and provides no basis for petitioner to obtain review.

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[7] The prima facie issue arose in *Bienkowski* only because the district court had dismissed the case on summary judgment prior to trial.

CONCLUSION

Based on the preceding facts, arguments and authorities, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 88-1460

IN THE

Supreme Court of the United States

October Term, 1988

DENNIS GROHS,

Petitioner,

vs.

GOLD BOND BUILDING PRODUCTS, a division of NATIONAL GYPSUM COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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On Petition for Writ of Certiorari to
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for the Seventh Circuit

PETITIONER'S REPLY BRIEF

Respondent has described this as an "ordinary, run-of-the-mill ADEA case." The Seventh Circuit has made this case significant by rewriting the facts contrary to the well-established mandate

of this Court. The appellate court did not just "review" the record, but "reweighed" the record and made its own presumptions, inferences and findings of fact. The Seventh Circuit has overstepped its bounds by duplicating the efforts of the trial court. The result is a "huge cost in diversion of judicial resources," cautioned against in Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

I. RESPONDENT'S FACTS

Respondent has misstated or ignored facts upon which the district court based his opinion. In making the decision to reopen the Waukegan plant, upper managment determined that poor labor relations **policies** were largely responsible for the deterioration of the plant. [Pet. App. 28] Dennis Grohs had strictly followed the **old policy**, which made him a strict boss and a head knocker at times, but that

was what management perceived as necessary to run the Board Plant. Not only Grohs, but all supervisors were experiencing problems with labor relations because prior to the shutdown employee discipline was inconsistent. [Pet. App. 100]

At the start up, Mike Ward wanted his supervisors to be "tuned in" to labor relations. [Pet. App. 70] There is no record evidence that Ward was told to place "great importance" on labor relations. However, one of his objectives was to foster good relations among the employees. [Pet. App. 71] Thus, Ward instituted a **new policy** of softer supervision to be followed by the supervisory personnel. As the trial court found, this new policy was that "management would stroke the workforce a <u>little more</u> than had previously been the practice." [Emphasis added. Pet. App. 3a] Grohs was

not given the chance to follow the new policy. The district court found that Respondent did not seek "to teach him new tricks to the limited extent that that was necessary." He was discharged. All of the remaining supervisors, ages 31, 33, 41 and 43, were taught the new policy.

It is true that the district judge allowed Mike Ward to testify at great length about numerous hearsay statements allegedly made by Thomas Brooks. However, it is clear from the district court's opinion that he did not credit Ward's testimony. Brooks could have easily laid off Grohs in October, 1981, or January, 1982. Instead, Brooks retained Grohs and three other supervisors during the shutdown. As the court found, he gave Grohs very good ratings coupled with good raises. Also, Robert Coventry, Grohs' direct supervisor prior to the shutdown,

and Murray Qualls, Grohs' supervisor during the shutdown, both testified that Brooks was very pleased with Grohs just prior to the shutdown. Brooks did not testify. At the time of the trial, he was a Plant Manger employed by Respondent in Phoenix, Arizona. A custodian of records was flown in from North Carolina to testify, and a former employee, who was first contacted the day before trial, was also flown in from North Carolina to testify. Respondent did not explain why Thomas Brooks, its most important witness, did not testify at the trial.

In its Opposition, page 10, Respondent states: "Petitioner never challenged the fact that Ward read and heard these reports or that he relied upon them in deciding to discharge petitioner." As for what he had "read," Ward admitted that it appeared that Grohs had done a good job

as Board Plant Superintendent on paper. Also, at the trial counsel for Grohs argued that Ward's belief could not have been genuine because the most crucial witness, as well as other witnesses, did not testify and Respondent's witnesses who did testify, including Ward, were all impeached.

The district court rightly found the numerous allegations against Grohs to be a pretext list, dredged up by Respondent after Grohs' discharge in response to an inquiry from the EEOC. The district court questioned whether the incidents had ever happened and found them to be meaningless.

Darlene Ramig, the payroll secretary, and Jon Roth, the former union president, both testified for Respondent. Their testimony was impeached by Petitioner. Roth was the strong leader of the union who filed grievances on 50% of the

complaints of the union members. Grohs had very few grievances filed against him over the years, including the last 3 years prior to the shutdown. The Court found that fact to be significant. The Court also found that Grohs, being much older, addressed all of his employees as "boys," and Grohs quit when he was told that the black employee did not like it. The court did not find that Grohs was hated, but that given his role as a strict boss it would not be surprising if Grohs was disliked. The root cause of most labor-management relations at the plant was the company's own labor relations **policies** - not Grohs. [Pet. App. 28] The district court did not credit Ward's testimony.

Likewise, the payroll secretary, Darlene Ramig, who testified for Respondent, was impeached. She admitted that she had not recalled a "motel

proposition" by Grohs when she was shown Respondent's allegations to the EEOC and questioned about it by the undersigned in August, 1984. Nor was the comment made by Grohs a "lesbian" comment. [1]

Respondent claims that each of Grohs' last three appraisals ranked him low in employee relations. Labor relations was not a priority at that time. Labor relations referred to the uniform system of discipline Respondent was instituting because Grohs, as well as all of the other supervisors, was inconsistent. Grohs' August, 1980, appraisal rated him "close to outstanding" in job performance and

[1] At the trial and in its brief to the appellate court, Respondent claimed that Grohs referred to Becky Parkman and Donna Bittner as "dikes." Grohs testified and Ramig confirmed that he had made a joking statement, "If I didn't know any better, I'd think that those two were in love." The two women were sitting at a restaurant with their heads together. [Pet. App. 121]

stated that he was weak in labor relations, but striving to improve. Grohs' August, 1981, appraisal indicates that he had improved in labor relations. Grohs testified that he received a good oral evaluation, coupled with a good raise, at the shutdown in February, 1982. Grohs signed a blank evaluation because Brooks did not have time to complete it. [Tr. 333] Before Grohs became Board Plant Superintendent in 1979, he was Mill Superintendent for 7 years. In that job, his labor relations were excellent because it was a slow-moving department with more senior and skilled employees. [Pet. App. 33, 95, 96] The job of Board Plant Superintendent was a challenge because it was a large department with unskilled employees, high-speed, dangerous equipment and many employee problems. [Pet. App. 90, 91, 93, 94 105, 106] Grohs had to

supervise the employees through 3 foremen. Grohs had problem people, not people problems. [Pet. App. 94] Grohs was told by the Plant Manager to knock heads together because the employees needed discipline. [Pet. App. 105-106] He did what he was told and he received good performance evaluations and good raises. Labor problems only dealt with the uniform system of discipline Respondent was instituting at the time. Grohs direct supervisor, Robert Coventry, testified that prior to the shutdown, Grohs did not have labor relations problems. [Pet. App. 97aa] Grohs was the supervisor that Respondent had raised him to be. Mike Ward, himself, admitted during the trial that on paper it had appeared that Grohs had done a good job as Board Plant Superintendent. [Pet. App. 78]

When Ward discharged Grohs, he told him that he could not get along with his peers. Nothing was said about the hourly employees. Respondent added new reasons for Grohs' discharge in its letters to the EEOC. Additional reasons were given during discovery. Finally, at the trial even more reasons were given. The district court found these reasons to be a pretext list.

At the same time Ward discharged Grohs, April 29, 1983, he hired Roth (age 43). Ward groomed Dave Burks, age 33, to become the Board Plant Superintendent. [Pet. App. 119-120] Burks resigned at the end of July, and on September 1, 1983, Ward hired Herman Fraley, age 34, as Board Plant Superintendent. Contrary to Respondent's assertions, Junior Henkel, age 53, was hired long after Roth and Fraley, in March, 1984, eleven months

after Grohs' discharge and long after the union was decertified.

II. THE DISTRICT COURT'S OPINION

The finding of direct evidence of discrimination is in the district court's opinion in black and white. Robert Sarvis "leaned on" Ward to "get rid of Grohs" because Sarvis believed that Grohs was "old and fat." That finding is based upon record evidence. That finding alone requires reversal by this Court.

The district court's opinion is consistent and therefore not clearly erroneous. The district court found Grohs to be what Respondent had raised him to be and had expected him to be until the time of the start up. [Pet. App. 4-5] The Court found that not only Grohs, but all of the supervisors were "big, strong, husky fellows without particularly sophisticated educational backgrounds, who were

direct, strict, somewhat rough around the edges, and comfortable on the production floor." [Pet. App. 4] Respondent changed its labor relations **policies** at the start up. The Court did not find that Grohs could not meet the new standards, but that the standards had been different in the past.

The district court accepted Grohs' own description of himself as a "head knocker" because in 1979, when he became Board Plant Superintendent, Grohs had been instructed to knock heads together by the Plant Manager. The Court rejected Ward's testimony about the reports he had received about Grohs and held that they were no more than a laundry list or pretext list.

III. RESPONDENT'S ARGUMENT

The issue in this case is discriminatory intent. In Pullman-Standard v.

Swint, 456 U.S. 273 (1982) this Court held that the existence of discriminatory intent is an issue of fact to be determined by the trial court. Here, the district court listened to live testimony and made credibility determinations. The Court believed Grohs and his witnesses and discredited Respondent's witnesses. The findings of the Court that Respondent acted with discriminatory intent when it discharged Grohs are supported by testimonial evidence. However, the Seventh Circuit chose to believe Respondent's witnesses. In Hagge v. Bauer, 827 F. 2d 101, 108 (7th Cir. 1987) Judge Posner [one of the judges on this panel] upheld a district court's opinion as not clearly erroneous even though Posner felt that the evidence was "thin." The basis for Judge Posner's ruling was that the Court had made credibility

determinations based upon witness testimony. In the instant case, the findings are supported by testimonial evidence and are thus not clearly erroneous. [2]

The district court did not find that Grohs lacked qualifications for the new role of the supervisory force. The court found that Respondent did not give him a chance. He had been a good, strong performer and he was discharged. Also, contrary to Respondent's assertions, younger employees were being taught about the new labor relations policies. The court did not credit Ward's testimony that he based his decision on the negative reports he allegedly received. Also, Ward

[2] None of the cases cited by Respondent for the proposition that the trial judge's finding of fact must be supported by substantial evidence address credibility findings based upon testimony.

admitted that he was aware that during the shut-down of the Waukegan plant, Grohs had trained employees at the start-up of Medicine Lodge, one of Respondent's. largest plants. [Tr. 188] Grohs had done an excellent job training the employees and there were no complaints. [Pet. App. 56] Thus, the most recent information about his superisory job performance was just prior to the Waukegan start up.

Respondent has spent much time unnecessarily on the Seventh Circuit's rejection of Petitioner's arguments. It is true that the appellate court accepted Respondent's facts and argument verbatim. However, the central issue to be addressed by this Court is whether the District Court's opinion is supported by the evidence. The district court's finding of direct and circumstantial evidence of

discrimination is amply supported by the record.

IV. ERRORS

In its brief Respondent has chastised Petitioner for typographical errors in his Petition Appendix. Those errors were unintentional. Dennis Grohs has not been gainfully employed since 1983. He has only worked part-time since late 1986. Grohs could not afford to have his briefs and appendix printed. Therefore, they were hurriedly typed. Also, this is the first time the undersigned, who is a sole practitioner, has appeared before this Court.

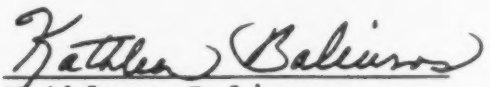
It should be mentioned that it was no error on Respondent's part that Richard Lieberman was not named as counsel of record, although this Court mandates him to identify himself as such. Mr. Lieberman not only examined and cross-

examined witnesses, but he gave both the opening and closing arguments at the trial. His co-counsel at the trial is the sole attorney named as counsel of record.

Conclusion

Based upon the foregoing, it is respectfully requested that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,



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